

# Writing Other Peoples' Constitutions

*Paul D. Carrington†*

## TABLE OF CONTENTS

I.	Introduction .....	167
II.	Other Early Models of Constitutionalism.....	170
	A. Liberia .....	173
	B. Hawaii .....	178
	C. Cuba .....	183
	D. The Philippines .....	186
	E. Siam .....	196
	F. Japan.....	199
	G. Germany.....	206
	H. Israel.....	209
III.	Other More Recent Constitutions.....	215
IV.	Conclusion .....	217

### I. Introduction

Generations of American school children have memorized the words of Jefferson's Declaration of Independence. Its evangelical spirit was echoed in Lincoln's Gettysburg Address and scores of other presidential addresses. Perhaps partly on that account, numerous Americans, perhaps especially American lawyers, have since the 1780s presumed to tell other peoples how to govern themselves. In 2003, the United States, not for the first time, explained a military adventure as one motivated by the benign aim of replacing a bad government with a good one. In fairness, it might be noted that the Spanish,<sup>1</sup> British,<sup>2</sup> and Ottoman Empires<sup>3</sup>

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†Professor of Law, Duke University. This essay draws material from *SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES* (2005). I am especially grateful to Kristin Seeger for her excellent assistance in assembling it.

<sup>1</sup> WILLIAM H. PRESCOTT, *HISTORY OF THE CONQUEST OF MEXICO AND HISTORY OF THE CONQUEST OF PERU* 148-150, 636-638 (Cooper Square Press 2000) (1843) (Mexico separately) (1847) (Peru separately).

were similarly explained to their triumphant subjects as humanitarian ventures, and that German intellectuals in 1914 explained the invasion of Belgium as necessitated by Germany's duty to terminate the oppressive influence of the Czar's regime that threatened the values of western society and was being shielded by France.<sup>4</sup>

Many years before Jefferson wrote the Declaration, the poet John Milton, reacting to the imperial impulse of his colleagues in the English Parliament, told them that not words, nor money, nor arms, but example was the one effective means to export English ideas and values to distant peoples. In 1898, Milton's words were repeated to Americans by James Bradley Thayer, the most eminent constitutionalist of his day in opposing the initiation of America's war with Spain; Thayer concluded: "Let not [America] forget her precedence of teaching nations how to live."<sup>5</sup> Long before the misadventure in Iraq, American experience had repeatedly confirmed the wisdom of Milton's advice. *Professor* Woodrow Wilson observed in 1908 that Americans ought to know that truth more clearly than anyone as a result of our national experiences in failed efforts to transform indigenous cultures or to reconstruct the South after the Civil War.<sup>6</sup> But as President, the former professor Wilson forgot his own insight. His proclamation that "the world

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<sup>2</sup> Cf. Prime Minister William Gladstone: "We think that our country is a country blessed with laws and a constitution that are eminently beneficial to mankind, and if so what is more desired than that we should have the means of reproducing in different portions of the globe something as like as may be to that country which we honor and revere?" quoted by PAUL KNAPLUND, *GLADSTONE AND BRITAIN'S IMPERIAL POLICY* 202 (George Allen 1927)

<sup>3</sup> LORD KINROSS, *THE OTTOMAN CENTURIES: THE RISE AND FALL OF THE TURKISH EMPIRE* 197-215 (1977). On traditional Islamic evangelism, see BETTY KELEN, *MOHAMMED: THE MESSENGER OF GOD* 243-50 (1975).

<sup>4</sup> See 1914 Manifesto of The Ninety Three German Intellectuals to the Civilized World, Jorgen Ungern-Sternberg & Wolfgang Ungern-Sternberg, *Der Autraf "An Die Kulturwelt"* 162-164 (Stuttgart 1996). German text available at, <http://www.nernst.de/kulturwelt.htm>.

<sup>5</sup> Quoting Milton: "'Let not England' said John Milton to Parliament in 1645, forget her precedence of teaching nations how to live." James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 465-66 (1899).

<sup>6</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 52-53 (The Univ. of Columbia Press 1908). For a recent account of the expectations of Reconstructionists, see WILLIAM L. BARNEY, *BATTLEGROUND FOR THE UNION: THE ERA OF THE CIVIL WAR AND RECONSTRUCTION, 1848-1877* 225-303 (1990).

must be made safe for democracy”<sup>7</sup> proved, as many foresaw, to be a disservice to the cause it proclaimed.<sup>8</sup>

This essay is a brief account of the efforts of Americans who sought to shape other nations not by war, but by writing, or helping to write, their constitutions, a task that they were sometimes asked to perform on behalf of those who were to be governed by their words.<sup>9</sup> It will conclude that Milton and Professor Wilson were correct, and President Wilson was wrong to broadcast the contrary notion that democracy is just waiting to happen if only a benign army would release it from an oppressive force preventing its emergence. Constitutions work to provide political stability if they reflect the inculturated notions of those they govern, but not otherwise. This has, as Professor Wilson observed a century ago, been a hard lesson for Americans to learn.<sup>10</sup> In 2006, notwithstanding current events, the persistent impulse to tell others how to govern themselves was once again echoed in an address to the American Bar Association by a Justice of the Supreme Court.<sup>11</sup>

While the idea of a written constitution enforced by national courts was an American novelty, it was less novel than many may suppose. Colonial America had been governed for a century and a half in accord with diverse royal charters, and those charters had on occasion been enforced against colonial legislatures by the

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<sup>7</sup> Woodrow Wilson, An Address to a Joint Session of Congress (April 2, 1917), in 41 PAPERS OF WOODROW WILSON 525 (Arthur S. Link ed., 1983) (recording entire speech explaining the need to declare war against Germany).

<sup>8</sup> See, e.g., the speech of Robert La Follette opposing the declaration of war. 55 CONG. RECORD, 65<sup>th</sup> Cong. 1<sup>st</sup> Sess. 223-236 (1917). On the opposition to war expressed by William Jennings Bryan, See LAWRENCE W. LEVINE, DEFENDER OF THE FAITH: WILLIAM JENNINGS BRYAN: THE LAST DECADE 1915-1925 at 29-30 (New York 1965).

<sup>9</sup> For more details on the experiences of legal missionaries, see CARRINGTON, PAUL D., STEWARDS OF DEMOCRACY (1999).

<sup>10</sup> For a full statement of the imperialist impulse in democratic disguise, see JOSHUA MURAVCHIK, EXPORTING DEMOCRACY: FULFILLING AMERICA'S DESTINY 6-8 (1991); see also Statement of Principles, THE PROJECT FOR A NEW AMERICAN CENTURY (1997), available at, <http://www.newamericancentury.org/statementofprinciples.htm>. That statement of the world's ripeness for an era of American imperial-democratic government was signed by, among others, Richard Cheney, Donald Rumsfeld, Paul Wolfowitz, and Jeb Bush.

<sup>11</sup> For a video of Justice Kennedy's keynote address to the ABA on Aug. 5, 2006 see [http://www.abavideonews.org/ABA374/audio\\_video.php](http://www.abavideonews.org/ABA374/audio_video.php).

King's Privy Council.<sup>12</sup> Eleven of the thirteen colonies were quick in 1776 to re-write their charters as constitutions, with the expectation of judicial enforcement.<sup>13</sup> So the draftsmen at Philadelphia who wrote the federal Constitution were not engaged in totally creative handiwork. Nor was the Marshall Court when it first invoked its power of judicial review.<sup>14</sup> But the invention of the written constitution became an item for American legal missionaries. Their efforts have generally proved harmless, but they have seldom been noticeably effective in nurturing democratic values, long-term political stability, or even conditions favoring market economics.

The first American to undertake to write a constitution for another nation was Gouverneur Morris, a New York lawyer who was an important draftsman of the constitution published at Philadelphia in 1787. Soon thereafter, he was in Paris advising King Louis that what was needed to calm the melee in the streets was a written constitution that he, Morris, was available to draft.<sup>15</sup> This suggestion was made at the same moment that Jefferson was assisting the Marquis de Lafayette in drafting The Declaration of the Rights of Man<sup>16</sup> purporting to capture the aims of the rising revolution that was generating that melee. Neither Jefferson nor Morris succeeded in creating peace where there could be no peace. After them came Napoleon and one misadventure led to another.

## II. Other Early Models of Constitutionalism

Without need of American help such as that offered to Louis XVI by Morris, there would soon be numerous other national

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<sup>12</sup> See generally EDWARD RAYMOND TURNER, *THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1603-1784* (Johns Hopkins Univ. Press 1928) (discussing the relationship of the Privy Council with the Colonies).

<sup>13</sup> For an account of early state constitutions, see generally JAMES Q. DEALEY *GROWTH OF AMERICAN CONSTITUTIONS: FROM 1176 TO THE END OF THE YEAR 1914* (Da Capo Press 1972) (1915).

<sup>14</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>15</sup> RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION* 125-126 (2003).

<sup>16</sup> See MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 380-381 (New York 1970). On Jefferson in France see R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF AMERICA AND EUROPE 1760-1800* 250-51 (1959).

constitutions somewhat fashioned on the American example.<sup>17</sup> In 1814, a national constitutional convention was gathered in Norway, and its product remains in force today.<sup>18</sup> Belgium and the Netherlands soon followed Norway in writing constitutions. Most Latin American republics published written constitutions in the 1820s.<sup>19</sup> All of these works bore some resemblance to the American in the forms of the governments they created, but there was little if any direct involvement of North Americans in shaping those forms of government and little if any judicial enforcement of the governing texts. Indeed some Latin America constitutions were, perhaps of necessity, repeatedly rewritten.<sup>20</sup>

By the middle of the nineteenth century, a very different American model could be seen in state constitutions being written and ratified to confer much larger roles on voters to select directly a range of officials including judges.<sup>21</sup> That model of popular self-government has seldom if ever been replicated in other nations.

But many other national constitutions did follow. Chancellor Bismarck promulgated a German constitution in 1871 to mark the consolidation of the German states that he had effected; it prescribed separations of powers.<sup>22</sup> Its forms may have been influenced by the work of Francis Lieber, a Prussian-American, who was earlier consulted by the Prussian government and who in

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<sup>17</sup> On older European constitutions, see *THE CONSTITUTIONS OF EUROPE* (E. A. Goerner ed. Chicago 1967).

<sup>18</sup> On American influence on the Norway constitution, see JAMES A. STORING, *NORWEGIAN DEMOCRACY* 22-25 (1963).

<sup>19</sup> For a brief account of Latin American constitutions, see RUSSELL H. FITZGIBBON, *LATIN AMERICAN CONSTITUTIONS* (1974).

<sup>20</sup> *Id.*

<sup>21</sup> For the best contemporaneous account of the conventional wisdom regarding the judicial power in the first half of the 19<sup>th</sup> century FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 438-475 (Belknap Press of Harvard Univ. Press 1968) (1848).

<sup>22</sup> "The Imperial constitution of 1871 was a hotch-potch, hastily put together by Bismarck to serve his own ends. . . . Show-piece of the constitution was the Reichstag, elected by universal suffrage . . . . The Reichstag could hold debates and could pass (though not initiate) laws; its consent was necessary to the expenditure of money. But it possessed no powers. The constitution laid down that the Imperial Chancellor was "responsible" but it did not say to whom – certainly not to the Reichstag." A. J. P. TAYLOR, *THE COURSE OF GERMAN HISTORY: A SURVEY OF THE DEVELOPMENT OF GERMANY SINCE 1815* 131 (Routledge Classics 2001) (1945).

1852 published a seminal work on comparative constitutional law.<sup>23</sup> In 1886, the Emperor of Japan gave his people a constitution; it had been drafted by a German legal scholar.<sup>24</sup> It established an elected Diet similar to the German parliament but reserved almost absolute power to the Emperor.<sup>25</sup> Yet a score of young Japanese were sent to Ann Arbor to study constitutional law with Thomas Cooley,<sup>26</sup> and there were instances of Japanese courts manifesting a measure of independence in the conduct of cases brought by the government.<sup>27</sup> The Republic of Germany in 1919 ratified a new constitution drafted at Weimar that was among the first to be judicially enforced.<sup>28</sup> The Soviet constitution published in 1924 proclaimed all manner of individual rights but was merely hortatory; it was rewritten without apparent consequence in 1936.<sup>29</sup> More useful to shield individuals from governmental excesses was the unwritten British constitution fashioned in 1688 that conferred virtually absolute power on Parliament, but subject to such constraints as its members might observe as necessary to protect the traditional rights imbedded in English morality.

One constitution radically different from the American is that of the Republic of Turkey, created as it emerged from the Ottoman Empire.<sup>30</sup> Its provisions separating church and state are

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<sup>23</sup> See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF GOVERNMENT* (J.B. Lippincott & Co. 1853); the work was republished three times, the last two were edited by Theodore Woolsey, the president of Yale.

<sup>24</sup> See EDWIN O. REISCHAUER, *JAPAN: THE STORY OF A NATION* 142 (3d ed., Alfred A. Knopf 1981); and for an account of Western influences on modern Japan see generally NEIL PEDLAR, *THE IMPORTED PIONEERS: WESTERNERS WHO HELPED BUILD MODERN JAPAN* (1990).

<sup>25</sup> FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 195 (1987)

<sup>26</sup> This statement is derived from an examination of Michigan class pictures by the author. A collection of photos of early Japanese alumni was hung in a classroom in 1978 and may still be there.

<sup>27</sup> See, e.g., LAWRENCE W. BEER & JOHN M. MAKI, *FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889-2002* 104-105 (2002).

<sup>28</sup> See DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 143-166 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

<sup>29</sup> For a summary of the 1924 and 1936 constitutions, see ROBERT L. MADDUX *CONSTITUTIONS OF THE WORLD* 238 (Cong. Quarterly 1995).

<sup>30</sup> Marcie J. Patton, *Constitutionalism and Political Culture in Turkey* in *POLITICAL*

extraordinarily rigorous, and the primary instrument of its enforcement is the military, whose officers are separately trained and taught that enforcement of the constitution is their primary professional duty, not that of mere lawyers and judges. However improbable this may appear from an American perspective, this seems in its own way to work, at least until the current controversy resulting from the election of 2007.<sup>31</sup>

#### A. *Liberia*

The first American actually to write a constitution for others was Simon Greenleaf, a Harvard law professor,<sup>32</sup> who was recruited by the American Colonization Society to provide a suitable instrument for the former slaves being resettled in Liberia.<sup>33</sup> No fault seems to have been found in his work, but it did not succeed in providing stable government over the longer term. The relationship between European settlers and the indigenous tribes of North America they dislocated foretold the relationship between the African-American settlers of Liberia and the indigenous tribes they dislocated. In hindsight, it is surprising that a government fashioned by that Liberian ruling class would endure as it did for more than a century. The Liberian constitution of 1847 might therefore be deemed the most successful effort of this kind.<sup>34</sup>

The idea of returning former slaves to Africa actually antedated the Declaration of Independence. Two Congregationalist ministers in New England sought in 1773 to raise money to train emancipated slaves to spread the Christian gospel in Africa. One of the two, Ezra Stiles, was President of Yale, a lawyer as well as a minister, and the leader of the emancipation movement in Connecticut. At the time, there was

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CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 138 (Daniel P. Franklin & Michael J. Baun eds., New York 1995).

<sup>31</sup> See Vincent Boland, *Draft Constitution Stirs Turkey Scarf Row*, FINANCIAL TIMES, Sept. 18, 2007, at 4.

<sup>32</sup> Greenleaf was the contemporary of Joseph Story and succeeded him as Dane Professor. For a brief account of his career see ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN 1817-1967* at 122-123, 137, 149-50 (1967).

<sup>33</sup> For the text and its evolution, see Alfonso K. Dormu *THE CONSTITUTION OF THE REPUBLIC OF LIBERIA AND THE DECLARATION OF INDEPENDENCE* (1970).

<sup>34</sup> *Id.*

substantial sentiment among freed slaves to return to Africa.<sup>35</sup>

This dream was made to seem attainable in 1815 when a New England Quaker at his own expense transported thirty-eight African-Americans to Sierra Leone on the west coast of Africa. That event had inspired the creation of the Colonization Society in 1816. No doubt there were members of the Society who envisioned involuntary deportation of former slaves, and later abolitionists would attribute that purpose to the organization and condemn its members for the brutality of such a scheme. But there is no reason to doubt that many of the founders of the Society, including Henry Clay and James Madison, simply aimed to bring a peaceable end to slavery in the South, such as had been achieved by gradual emancipation in the North in the last years of the 18<sup>th</sup> century, a process that also fell far short of full liberation for many slaves. The charter of the Colonization Society drafted by Clay committed them to voluntary resettlement only. They were optimistic that former slaves would prefer a country of their own, as for a time many did.

The Society made a false start at settling former slaves in Sierra Leone. The previously re-settled former English slaves did not relish an invasion of lowly former American slaves, and likely had their hands full working out a relationship with the indigenous population, a problem that seems not to have been fully resolved.<sup>36</sup> So the Society made a deal for some land in what was to become Liberia, and the first settlers reached that place in April 1821.<sup>37</sup> Each year for forty years, many additional immigrants would arrive and immigration would continue throughout the 19<sup>th</sup> century, but at a much reduced level after 1860. As late as the 1850s, some black leaders were still encouraging emigration to Liberia, despite growing repugnance to the scheme on the part of many abolitionists.

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<sup>35</sup> For brief accounts of the Colonization Society *see* LEONARD I. SWEET, *BLACK IMAGES OF AMERICA, 1784-1870* at 23-34 (1976); FLOYD J. MILLER, *THE SEARCH FOR A BLACK NATIONALITY: BLACK EMIGRATION AND COLONIZATION 1787-1863* 3-20 (1975).

<sup>36</sup> Lansana Gberie, *A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE* (2005).

<sup>37</sup> *See generally* Tom W. Shick, *BEHOLD THE PROMISED LAND: A HISTORY OF AFRO-AMERICAN SETTLER SOCIETY IN NINETEENTH-CENTURY LIBERIA* (1980); Yekutieli Gershoni, *BLACK COLONIALISM: THE AMERICO-LIBERIAN SCRAMBLE FOR THE HINTERLAND* (1985).



The black settlers in Africa, who became known as Americo-Liberians, resembled the European settlers of North America in both the manners and habits they tended to affect as well as in their relationship to the indigenous peoples. The Liberian land and climate were not generally conducive to agriculture; consequently most of the indigenous tribes were hunters and gatherers, not unlike many tribes populating North America, and sparsely distributed over the country. Americo-Liberian settlers made land deals at low prices, dislocating these diverse tribes. While some, particularly the members of a Moslem group, were more literate than many of the settlers, no indigenous tribes were literate in, or could speak, English, which was the uniting tongue of the settlers.

As the English-speaking settlers established themselves as a ruling class, the nearby indigenous families started to place their children in the households of the settlers as servants. As practiced, the relationship between master and servant was a step or two above chattel slavery. In that role, the "pawns" could be educated as settlers and thus made eligible for assimilation into the ruling class by marriage. The settler population was also increased by an infusion of "Congoes." These were newly captured slaves liberated by the United States Navy to prevent their delivery to the United States. They were brought to Liberia in the hope that they might be assimilated there; although few if any had acquired American habits, manners, or language.

Until 1847, the colony was governed from afar by the American Colonization Society. After 1839, there was a government of the Commonwealth of Liberia with a governor appointed by the Society, but a deputy governor who was locally elected by the Americo-Liberians. The indigenous ethnic groups were not invited to participate in governance. Their votes were no more welcome to the settlers than the settlers' own votes had been in the Southern states from which they had emigrated.

It became increasingly necessary for Liberia to settle international relations with the neighboring British and French empires. The Colonization Society proposed making the area an American colony, but the proposal received no support from the United States Congress. Consequently, in 1847, a Republic was proclaimed, with a constitution resembling that of the United States drafted by the American jurist by Simon Greenleaf in

Cambridge. Joseph Jenkins Roberts, a native of Petersburg, Virginia was the first President elected by the Americo-Liberians to serve in the capital in Monrovia. While President Roberts was not professionally trained, he, like many frontiersmen in America and in Liberia, acquired a measure of understanding and of commitment to the mission of bringing democratic law to his new and benighted land.

Monrovia in the 1840s and 1850s was an attractive capital. The most prosperous settlers resided in stone homes. The economy was supported in part by the aid of the Colonization Society. But the Colonization Society, in part as a result of the vigorous oppositions of abolitionists, became moribund after 1850,. For a while, Liberia profitably supplied camwood for use in the dye industry. A profitable sugar industry, followed by a coffee industry also developed, but none of these proved viable over the longer term. There were gold and diamonds, but not enough to justify the expense of mining. With no capital and little enterprise, the Liberian economy languished. In the latter years of the 19<sup>th</sup> century, some African-American entrepreneurs and benefactors began to take an interest in the country, but not sufficiently to generate a healthy national economy.<sup>38</sup>

The exclusion of indigenous people from the electorate was manifestly at odds with the vision expressed in Jefferson's Declaration and reflected in the text of the Liberian constitution. While this dissonance was recognized, it was not until 1884 that serious thought was given to enfranchising the indigenous peoples. Then, the idea was laid aside, apparently in fear that Americo-Liberian civilization would be subjugated to native paganism or Islam. The cultural, religious, and class gulf was believed too wide and too deep to permit the mutual trust required to share political power.

Among the continuing sources of conflict between the settlers and the indigenous peoples was the interest of some of the latter in continuing the slave trade. Some indigenous entrepreneurs viewed the settlers' abolitionism as a threat to a mainstay of their economy. Opinion among the settlers was not universal either, indeed, some Americo-Liberian settlers maintained slave

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<sup>38</sup> John Hope FRANKLIN & Alfred A. MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 167-68, 306-07 (7<sup>th</sup> ed. McGraw Hill 1994).

plantations of their own notwithstanding the disapproval of their fellow settlers. There were also conflicts over control of land and natural resources. As in North America, there was chronic war between the settlers and some of the indigenous tribes over such issues. Indigenous ethnic groups were forcibly relocated, if not so dramatically as President Jackson removed the Cherokee from Georgia, a brutal event not constrained by the Constitution of the United States.<sup>39</sup>

The laws enacted by the Liberian legislature were enforced, but often at the convenience, and the profit, of commissioners appointed by the President and serving at his pleasure. There was in each county a Court of Quarter Sessions and Common Pleas. Any deficiency in professionalism among the judges was partly ameliorated by the use of trial by jury in civil cases in accordance with American practice. Only in the 20<sup>th</sup> century did there begin to appear the rudiments of a trained legal profession. In that respect, the Republic of Liberia may have been in a weaker position than its indigenous peoples who had customary legal institutions administered by men of status in their respective ethnic groups. Even the enforcement of simple contracts was said to be problematic in the Liberian county courts.

There is no need to recount all the difficulties encountered by Liberia over the next century. It wasn't until the revolution of 1980 when the Americo-Liberian domination of Liberia formally ended.<sup>40</sup> The elected leaders were all murdered, and more than a few of the descendants of the settlers migrated back to the United States as Liberia descended into chaos.<sup>41</sup> Their remaining kin constituted only about two and a half percent of the population counted in the 2002 census.

The relationship of black settlers in Liberia to the indigenous peoples who were also black was not fundamentally different from

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<sup>39</sup> For an account of the litigation, *see* JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* (Univ. of OK Press 2004) (1996); for a recounting of the story *see generally* JOHN T. EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* (1988).

<sup>40</sup> On the revolution of 1980 and subsequent events, *see generally* STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* (1999); MARY H. MORAN, *LIBERIA: THE VIOLENCE OF DEMOCRACY* (2006).

<sup>41</sup> Charles Hill, *Distant Land, Shared History*, *WALL ST. J.*, July 31, 2003, at A1.

that of white settlers in North America to the indigenous people generally described as red. There was less homicide and slavery than in America, but only limited integration. And, in Africa, in the end, the indigenous ethnic groups prevailed because the settlers lacked the numbers and resources to prevent that outcome

### *B. Hawaii*

Hawai'i presented the next opportunity in constitution drafting. The indigenous Hawaiian population was among the very last in 1778 to encounter visitors of European extraction, so remote were their islands.<sup>42</sup> As elsewhere, this contact was devastating. While interaction was seldom overtly violent exposure to the germs and viruses imported by the new settlers decimated a population who had developed no immunities.<sup>43</sup> The resident royalty recognized the need for the help of immigrants in dealing with imperial powers. For some time, immigrants from America occupied the posts of attorney general and chief justice, while the foreign minister to the king was often British. The first chief justice, William Little Lee, studied law at Harvard with Simon Greenleaf and practiced law in Troy, New York.<sup>44</sup> Developing respiratory problems, he set out for Oregon in hope of finding relief. Sailing to Oregon, albeit circuitously, he encountered Honolulu and remained there for a decade, becoming an effective lawyer-missionary. He died in 1857 at the age of thirty-six.<sup>45</sup>

In his decade in Hawai'i, Lee was employed by the King in numerous roles, including drafting a constitution, a civil code, and a criminal code, and serving as the kingdom's first chief justice. He advocated the rule of law, universal male suffrage, and the rights of *kanakas* and foreigners to own land. He is said to have been "inspired by complex motives: paternalistic concern for the Hawaiians seen as children; moral commitment to the rule of law; capitalist desires for wealth."<sup>46</sup>

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<sup>42</sup> For a good account of the discovery see Edward Joesting, *HAWAII: AN UNCOMMON HISTORY* 25-40 (1972).

<sup>43</sup> See Jared Diamond, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* 195-215 (1999).

<sup>44</sup> See Sally Engle Merry, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 3-7 (2000).

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.*

The constitution Lee wrote was proclaimed by the monarch and ratified by voters in 1852.<sup>47</sup> An advisory parliament formed on the 18<sup>th</sup> century British model had emerged from the traditional meetings of upperclass *ali'i*. Under the Lee constitution, all male citizens were enfranchised to elect its members. Some of those elected were naturalized subjects or, increasingly, natives of mixed ancestry. Many indigenous people remained skeptical of the advice given their royalty by the naturalized advisors and were not inclined to participate in democratic elections, but the constitution surely reduced the exposure to imperial domination.

The sale of land to foreigners was recognized by many as a threat to customary life styles of the indigenous population. But Kamehameha III decided, on the advice of the elected parliament, to dissolve the feudal system and allow land to be sold.<sup>48</sup> One reason was that the shortage of *kanakas* and slaves resulted in returns to the *ali'i* insufficient to maintain their lifestyles. The king authorized most *ali'i* to record their land titles, and authorized a massive auction of their lands. While the principal beneficiary of the auction was the royal treasury, it also enabled some of the *ali'i* to retire their debts and others to consume more goods.

While only Hawaiians could participate as purchasers in the initial auction, many were Hawaiians of foreign ancestry. Some of the land was resold to citizens or subjects of foreign countries who were not naturalized. Only one percent of that sold was acquired by "the common people," i.e., the *kanakas*. At least one missionary, C. P. Judd, protested bitterly that "[t]he sovereignty is the soil" and any scheme to sell it to citizens of the United States (but not to naturalized citizens) was therefore objectionable. However, the prevailing view among the missionaries was that the right to buy and sell land was necessary if "the Hawaiian race" were ever to "rise to the habits of industry."<sup>49</sup> Certainly it was difficult for Americans whose ancestors had bought land from Native Americans at bargain prices to see evil in such exercises of

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<sup>47</sup> See Gavan Daws, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 184-185* (1968) (describing the history of the Hawaiian constitution of 1852).

<sup>48</sup> Marshall D. Sahlins, *SOCIAL STRATIFICATION IN POLYNESIA* 124-135 (Univ. of WA Press 1958).

<sup>49</sup> *Id.* at 133; see also U.S. House of Rep., *Foreign Relations of the United States, 1894: Affairs in Hawaii*, H.R. Exec. Doc. No. 53-1, pt. 1, at 106 (1895).

the human right to freedom of contract, anymore than the Americo-Liberians had seen a moral problem in buying for a song the lands of indigenous Africans. If indigenous peoples made poor decisions about investing the proceeds of their land sales, that was not a concern of the buyers, on the frontier, in Africa, or in the islands.

The great auction did not immediately produce new wealth, but within two decades the lands sold were producing for export large quantities of sugar and pineapple, and had become some of the most valuable agricultural lands on the planet. The *kanakas* participated very little in this new agriculture. They were not only diminished in number but were perceived to be not very industrious workers. Additional workers were therefore needed to harvest the more difficult crops. Peasants were brought in from China, Japan, Korea, Puerto Rico, Portugal, and the Philippines to do what needed to be done.<sup>50</sup>

Lee's 1852 constitution did not survive the resulting turmoil. It was replaced in 1864 as a result of a *coup*.<sup>51</sup> Monarchists and others fearing the influx of foreign workers proposed formidable property qualifications for voting. When a convention called to ratify that amendment proved unwilling to disenfranchise the people, the King simply proclaimed a new constitution with the desired revision. This action opened a deep divide in the parliament between monarchists, most of whom were indigenous, and republicans, most of whom were foreign-born and spoke English. Their sessions were conducted bilingually and seldom in good temper.

But Lee would not be the last person with American ties to write an Hawaiian constitution. In 1872, the last direct descendant of the imperial Kamehameha died; his successors were all elected by parliament as provided by the 1864 constitution. The second of these was David Kalakaua; his election in 1873 evoked a riot that was stilled with the help of American and British sailors anchored in the harbor.<sup>52</sup> He lived well, and beyond his means. In 1886, he

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<sup>50</sup> See Lawrence Fuchs, *HAWAII PONO, A SOCIAL HISTORY* (1961) (recounting the immigration and assimilation of foreign workers in Hawaii).

<sup>51</sup> Daws, *supra* note 47, at 185.

<sup>52</sup> Joesting, *supra* note 42, at 209-210.

made a comical effort to add Samoa to his empire.<sup>53</sup> When that failed, he went on a tour of Europe. The *New York Times* reported that he planned to sell his kingdom to pay his debts, leading the American State Department to advise the countries he visited that any such sale would be a breach of its reciprocity treaty with Hawai'i.<sup>54</sup>

In 1887, his parliament, inspired by these events and led by men mostly of foreign ancestry or birth, but including some of primarily native ancestry, forced the spendthrift king to accept a new constitution franchising all male *residents* of the islands save those *born* in Asia (the exception not made in William Little Lee's constitution of 1852), making the government accountable to the legislature, and providing abundant guarantees of property rights. When Kalakaua rejected the proposed draft and called out his House Troop to defend his royal prerogatives, parliament was supported by the Honolulu Rifles, a volunteer group most of whose members were of European descent. Kalakaua backed down. This "bayonet constitution" (as it became known to some of the king's supporters) reduced the democratically elected king to a figurehead role similar to that of British monarchs of that time.<sup>55</sup> Although bayonets were employed as a threat, no one was harmed and the change was accomplished without sustained protest by subjects loyal to the monarchy. The new constitution was approved by a resounding vote of those people other than the many thousands of naturalized Asian subjects who were excluded from the electorate.

When Kalakaua died in 1892, Parliament selected his sister Lili'uokalani as Queen despite the fact that a *coup* had been attempted in her name only three years earlier. She still had the support of a monarchist group, the Native Sons of Hawaii, many of whom had supported her attempted *coup*.<sup>56</sup> She informed her

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<sup>53</sup> For accounts of the Samoan misadventure *see generally* J. W. DAVIDSON, *SAMOA MO SAMOA: THE EMERGENCE OF THE INDEPENDENT STATE OF WESTERN SAMOA* (1967); Paul M. Kennedy, *Germany and the Samoan Tridominium, 1889-98*, in *GERMANY IN THE PACIFIC AND FAR EAST, 1870-1914* at 89 (John A. Moses & Paul M. Kennedy eds. 1977).

<sup>54</sup> Joesting, *supra* note 42, at 214.

<sup>55</sup> *See* Merze TATE, *THE UNITED STATES AND THE HAWAIIAN KINGDOM: A POLITICAL HISTORY* 86-93 (1965).

<sup>56</sup> For a comprehensive account of the attempted coup, *see* Daws, *supra* note 47, at 264-280.

cabinet that she would (in the manner of 1864) dismiss parliament and proclaim a new constitution reclaiming the powers ceded in "the bayonet constitution" by her predecessor. She was advised by her cabinet that this would embolden parliament to proclaim a republic. The popular approval of the constitution in 1887 indicated to some that she lacked the support needed to impose a powerful monarchy on an increasingly diverse population many of whose members expected to govern themselves. Although two of her ministers refused to sign the order, she ordered parliament to dissolve, announcing that she would proclaim a new constitution "in a few days."

While matters were in this state, annexationists in the parliament, as foretold by the Queen's advisors, seized the moment.<sup>57</sup> They were led by three native lawyers all of whom were grandchildren of the Congregationalist missionaries who had converted the royal family to their faith in 1819: Sanford Ballard Dole, Lorrine Andrews Thurston, and William Owen Smith. Dole had read law in an office in Boston and been admitted to the bar in Massachusetts before returning home to practice in Honolulu. Thurston had studied law with Theodore Dwight at Columbia University before returning to practice law. Smith had read law in Honolulu.

Following the example of King Kalakaua in 1873, the annexationists sought the support of the American minister, John Levitt Stevens, a journalist by trade. Stevens summoned 162 sailors from an American ship, ostensibly to protect American citizens in the expected mayhem, but he stationed them around a government building, not around Americans or their property, and thus protected the annexationists. Although he denied complicity with the annexationists, the conduct of Stevens was rightly seen as a violation of international law. On that account and because it rejected the idea of American imperialism, Congress refused to annex the islands as a colonial territory.

The Republic of Hawai'i was thus left to fend for itself. On July 4, 1894, a new and plutocratic constitution drafted by the Dole and other "Americo-Hawaiians" (known in Hawaii as *haoles*) was proclaimed, one that limited the voting franchise to those who could read, write, and speak English, and limited office

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<sup>57</sup> Joesting, *supra* note 42 at 235-237.



holding to those with substantial property.

In 1898, while the United States was at war with Spain, annexation was at last approved by a joint resolution of Congress making all Hawaiians citizens of the United States and forbidding constraints on suffrage by the territorial government.<sup>58</sup> Congress had resigned itself to the imperial role. Hawaii would not again have its own constitution until statehood came in 1961.

### C. Cuba

The war with Spain was occasioned by a revolution on the island of Cuba that had raged for the last quarter of the 19<sup>th</sup> century, largely maintained on behalf of peasants and slaves, and with much Jeffersonian rhetoric.<sup>59</sup> Some of its advocates came to reside in the United States. William Randolph Hearst's and other newspapers provided horrifying accounts of the many brutalities perpetrated in Spanish concentration camps on the impoverished revolutionaries and their kin. Among the responses, if William Randolph Hearst's journalists can be believed, was that of 600 Sioux braves who offered to gather every Spanish scalp on the island.<sup>60</sup> Feeling pressed, President McKinley announced in December 1897 that American patience with Spain's governance of Cuba was "not infinite." In February, the press somehow acquired and published a letter written by the Spanish Ambassador to the United States to his superiors in Madrid commenting on McKinley's speech and describing the President as "weak and a bidder for the admiration of the crowd." This led to the resignation of the Ambassador and heightened pressure on McKinley.<sup>61</sup> And on February 15, the battleship *Maine* exploded while on a peaceful visit to Havana. Many seamen died in the explosion. The Navy could not explain the cause, and it was rumored that it was the result of a deliberate act by Spain or by

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<sup>58</sup> See William Adam Russ, *THE HAWAIIAN REPUBLIC (1894-1898) AND ITS STRUGGLE TO WIN ANNEXATION* (Susquehanna Univ. Press 1992) (1961).

<sup>59</sup> See *SLAVES, SUGAR AND COLONIAL SOCIETY: TRAVEL ACCOUNTS OF CUBA 1801-1899* (Louis A. Perez Jr. ed., Scholarly Resources 1992).

<sup>60</sup> See G. J. A. O'Toole, *THE SPANISH WAR: AN AMERICAN EPIC - 1898* at 165 (Norton 1984); and see generally CHARLES H. BROWN, *THE CORRESPONDENTS' WAR: JOURNALISTS IN THE SPANISH-AMERICAN WAR* (Scribner 1967).

<sup>61</sup> ROBERT DALLEK, *1898: MCKINLEY'S DECISION, THE UNITED STATES DECLARES WAR ON SPAIN* (Chelsea House 1969).

Cubans hoping to provoke intervention.

Congress demanded action.<sup>62</sup> McKinley complied by serving an ultimatum on Spain demanding liberation of Cuba. When that was not forthcoming, war was declared by Congress.<sup>63</sup> The resolution recognized a Republic of Cuba as "the true and lawful government of that island." It was approved by a vote of 67 to 21. Leading the opposition was Orville Platt, a Republican representing Connecticut.<sup>64</sup> Platt was a man given to learning, who, we are told, spent his evenings reading Greek literature aloud to his wife. His objection to the declaration of war was that it recognized a Republic of Cuba; while affirming that "the time has come when Spanish rule in Cuba must cease," he denied that there was a government in Cuba that could be recognized and insisted that the United States military would have to remain there until it was satisfied that a responsible government was in place.

The "splendid little war" against Spain lasted only 118 days. It resulted in few casualties and the lionization of Theodore Roosevelt.<sup>65</sup> Cuba was occupied by the United States Army, the concentration camps were opened, and a government was established under the command of General Leonard Wood, a medical doctor who favored the annexation of Cuba. Wood proved to be highly energetic in imposing reforms on the Cuban people.<sup>66</sup> His administration rid the city of yellow fever by exterminating the mosquitoes carrying the infection. It built sewers, paved streets, and turned parks into gardens. It whipped people for defecating in the streets. By such means, it greatly relieved the squalor that the Spanish Empire had been powerless to reduce. By 1902, Havana may have been the healthiest city in the western hemisphere. The occupation government also erected over 3000 school buildings throughout the island, creating a

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<sup>62</sup> See H.G. RICKOVER, *HOW THE BATTLESHIP MAINE WAS DESTROYED* (Naval Inst. Press 1976) (describing the destruction and aftermath of the destruction of the Battleship Maine).

<sup>63</sup> 55th Cong. Ch. 189; 30 Stat. 364.

<sup>64</sup> See *generally* LOUIS A. COOLIDGE, *AN OLD-FASHIONED SENATOR: ORVILLE H. PLATT OF CONNECTICUT; THE STORY OF A LIFE UNSELFISHLY DEVOTED TO THE PUBLIC SERVICE* (Kennikat Press 1910).

<sup>65</sup> See O'TOOLE, *supra* note 60, at 17.

<sup>66</sup> See Whitney T. Perkins, *CONSTRAINT OF EMPIRE: THE UNITED STATES AND CARIBBEAN INTERVENTIONS 6-11* (1981).

challenge to the government of the forthcoming republic to find teachers to staff them.

But in 1901, as a means of prodding the establishment of a democratic republic, Senator Platt attached a rider to the military appropriations bill directing the War Department to secure the agreement of the Republic of Cuba (when established) to the condition that the United States would have an obligation to intervene if and when democratic self-government on the island failed.<sup>67</sup> William Jennings Bryan and other anti-imperialists strenuously disapproved the Platt Amendment. Its terms were nevertheless forced into the Cuban Constitution of 1902 and into the treaty between the United States and Cuba.

Thus, at the behest of the Senate, the new Cuban constitution contained a provision bearing some resemblance to the provision of the Constitution of the United States guaranteeing a republican form of government. The guarantor in both constitutions was the United States, but Cuba was not a member of that federation. On its face, as Bryan and others emphasized, this was a serious affront to the right to self-government. On the other hand, even in 1902 it was evident that a republic serving people who had so recently and for so long been deeply divided by class and by religion was inherently very unstable. It was not unreasonable to seek some means of introducing a measure of stability.

The Platt Amendment had the unwelcome effect on Cuban domestic politics specifically foreseen by its critics, and begot precisely the sorts of disorder that it had been intended to prevent.<sup>68</sup> A government of religious conservatives had been elected in 1902 and re-elected in 1906. But the religious liberals questioned the vote count in the re-election. The result was violent disorder and the resignation of the government. Both sides were thus seeking the return of the United States Marines: the conservatives wanted the United States military to return to suppress the disorder, while the liberals sought their return in order to conduct an honest election. Only days before this outbreak of violence, Secretary of State Elihu Root had concluded a tour of Latin America proclaiming that “[w]e wish for no

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<sup>67</sup> *Id.* at 7-12; Edward S. Kaplan, UNITED STATES IMPERIALISM IN LATIN AMERICA: BRYAN'S CHALLENGES AND CONTRIBUTIONS, 1900-1920 at 12-13 (1998).

<sup>68</sup> Perkins, *supra* note 66, at 12-15.

victories but those of peace; for no territory except our own, for no sovereignty except the sovereignty over ourselves.”<sup>69</sup> The Marines immediate return to resolve the chaos in Cuba was more than a little embarrassing. An American Provisional Governor was appointed to serve under the Cuban flag. Cuba would be fully liberated a second time in 1908. But problems would recur in 1912, 1917, and 1920 leading to successive “liberations.” It became evident that the Amendment had contributed to a demoralization of Cuban politics. The arrangement was at last abrogated in 1934.<sup>70</sup> However, it is not clear that the subsequent history of Cuba would have been far different had there been no Platt Amendment and no effort on the part of the United States to impart its political values to those governing the island.

In Cuba, the decision of 1934 did little to assure constitutional democracy and legal rights on the island. Iron rule would soon be imposed by Fulgencio Batista and a few decades later by Fidel Castro. For the remainder of the 20<sup>th</sup> century, Cubans seeking democracy and individual rights would have to come to the United States to find them.

#### *D. The Philippines*

It was not clear to most Americans why the United States had liberated the Philippines in 1898. Unlike in Cuba there had been no popular clamor in the United States about the brutalities of the Spanish Empire in that venue. While there were rebels in the Philippines, American journalists had not discovered them and distributed their stories.<sup>71</sup> The gentle President McKinley acknowledged that he had been deeply troubled by the issues of imperialism and had prayed for wisdom in deciding what to do with the Philippines. His prayer, he told a religious group, had been answered by God, who advised him that America could not honorably return the Philippines to Spain, nor could it allow the Germans to take them (as indeed Germany gave substantial evidence of intending to do), and it was therefore a moral duty of

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<sup>69</sup> See Janice Hepworth, *A Policy of "Practical Altruism,"* 3 J. OF INTER-AMERICAN STUDIES 411 413 (1961).

<sup>70</sup> See Luis E. AGUILAR, *CUBA 1933: PROLOGUE TO REVOLUTION* (1972).

<sup>71</sup> See Alfred Whitney GRISWOLD, *THE FAR EASTERN POLICY OF THE UNITED STATES* 18-19 (Brace & Co. 1962) (1938).

the United States to govern and protect the islands and prepare the people for self-governance.<sup>72</sup> Others supported this decision, over the vigorous protest of many anti-imperialists.<sup>73</sup> What ensued was the most sustained effort so far undertaken by the United States to supply another nation with an American form of government. It was not a total failure, but neither was it a success.

There was much debate over what to do with the islands. Christopher Columbus Langdell, the former Harvard law dean and a sometime Wall Street lawyer, and a man seldom moved to express interest in political issues, joined in the debate to explain that some provisions of the Constitution of the United States would apply to new "possessions," but that the instrument posed no obstacle to their acquisition. He piously cautioned that:

If we are to undertake the government of dependent countries, with any hope of gaining credit for ourselves, we must enter upon the task with a single eye to promoting the interests of the people governed, and we must content ourselves with such material advantages as may accrue to us incidentally from a faithful discharge of our duty.<sup>74</sup>

Whatever the merits of the arguments, they were subordinated by the deeds of Emilio Aguinaldo y Famy. Aguinaldo had been leading a Filipino revolution against Spain, and in 1899 redirected his militancy against the United States.<sup>75</sup> For seven years, a war was waged, roughly on the scale of the better remembered Viet Nam venture. Whatever hope of national dignity some Americans nourished in their support of the imperial venture was substantially dispelled by this squalid struggle.

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<sup>72</sup> See CHARLES S. OLCOTT, *THE LIFE OF WILLIAM MCKINLEY* VOL. 2 109-111 (1916).

<sup>73</sup> See O'Toole, *supra* note 60, at 191-192, 223, 364-366 (describing the background on the German threat); see also JOHN R. DOS PASSOS, *A DEFENSE OF THE MCKINLEY ADMINISTRATION FROM ATTACKS OF CARL SCHURZ AND OTHER ANTI-IMPERIALISTS* (1900) (expressing support for the retention of the islands); see also ROBERT L. BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS: 1898-1900* (McGraw-Hill 1968) (accounting the criticism of McKinley's decision).

<sup>74</sup> Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 392 (1899).

<sup>75</sup> See also STUART C. MILLER, "BENEVOLENT ASSIMILATION:" THE AMERICAN CONQUEST OF THE PHILIPPINES: 1899-1903 (1982); JOHN DOBSON, *RETICENT EXPANSIONISM: THE FOREIGN POLICY OF WILLIAM MCKINLEY* 142-146 (1988); See generally DAVID H. BAIN, *SITTING IN DARKNESS: AMERICANS IN THE PHILIPPINES* (1984).

Because of the relative size and complexity of the Philippines and the continuing insurrection, no election was held there until 1907. President McKinley picked as the first American viceroy a federal judge and law school dean in Cincinnati, William Howard Taft, whose qualifications seem to have been his formidable intellect, his enormous size, and his geniality. As Governor of the Philippines, Taft was chair of a seven-member governing commission appointed by the President.<sup>76</sup> That commission remained in place for thirty years as the Executive branch of the territorial government. It was Secretary Root who drafted its directive, and there was little in it to which one might object. His orders were to establish the rule of law and individual freedom. The Filipinos would be required to accept these principles "for the sake of their liberty and happiness." Yet, the Commission

should bear in mind that the government they are establishing is designed not for our satisfaction, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices.<sup>77</sup>

Root's directive was sometimes observed, but concerns for the propagation of American ideas and values frequently seemed to dovetail with American economic interests.

In 1901, the Supreme Court of the Philippines was established to replace the *Audencia* established by the Spanish Empire.<sup>78</sup> The *Audencia* of Manila had sometimes exercised authority as the executive and sometimes served as a legal advisor to the Viceroy, when there was one. The *Audencias* when sitting as courts had been subject to appellate review by a court sitting in Madrid, and so it was expected that the Supreme Court of the Philippines was likewise subjected to appellate review by the Supreme Court of the United States.

Privately, Taft described the ruling class *caciques*, "as ambitious as Satan and quite as unscrupulous," and the peasant

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<sup>76</sup> On Taft's service on the Philippine Commission, see HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* Vol. 1 159-256 (1939).

<sup>77</sup> PHILIP C. JESSUP, *ELIHU ROOT 1845-1909* 356 (1938).

<sup>78</sup> See *A Credible Supreme Court Celebrates its 105<sup>th</sup> Anniversary on June 11, 2006*. MANILA BULLETIN, June 11, 2006, <http://www.mb.com.ph/issues/2006/06/11/SPRT2006061166515.html>. For a celebration of its centennial in 2001, see <http://www.opnet.ops.gov.ph/ops-speeches2001.htm>.

*taos* as “utterly unfit: for self-government.”<sup>79</sup> The *cacique* families were generally descendants of Spanish *dons*. They maintained feudal estates that were increasingly prosperous as a result of the sugar quota guaranteeing their owners profitable of exports to the American market. As Taft observed, American efforts “to uplift the ignorant” got little sympathy from *caciques*.<sup>80</sup> Many practiced extortion and embezzlement, habits that had been tolerated for centuries by viceroys from Madrid. Filipino judges shamelessly punished innocent rivals and exonerated their kinsmen and friends of obvious guilt, often falsely attributing their corrupt decisions to orders from American officers.<sup>81</sup>

As in Liberia, Hawai'i and Cuba, differences of class were reinforced by racial and ethnic differences. The *caciques*, while descendants of *dons*, were generally *mestizo* of indigenous and Chinese origins. The *taos* whom they held in peonage were members of numerous ethnic groups who spoke in as many as eighty different languages or dialects sufficiently distinct to preclude communication among them. Also, religious differences were keenly felt. One American from long experience observed that

[N]on-Christian tribes have two things in common—their unwillingness to accept the Christian faith and their hatred of the several Filipino peoples who profess it. Their animosity is readily understood when it is remembered that their ancestors and they themselves have suffered grievous wrongs at the hands of the Filipinos.<sup>82</sup>

Indeed, the Moros, who were Muslims, spoke their own language and were matriarchal in their sexual mores, were deeply offended if described as Filipinos, a tribe whom they reviled. Ethnic groups on the large southern island of Mindanao felt no connection to those of Luzon, the large northern island. In 1906, there was a new civil war in the South waged by people having no

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<sup>79</sup> Stanley Karnow, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES* 231 (1989).

<sup>80</sup> DEAN C. WORCHESTER, *THE PHILIPPINES PAST AND PRESENT* 661 (Macmillan 1914).

<sup>81</sup> KATHERINE MAYO, *THE ISLES OF FEAR: THE TRUTH ABOUT THE PHILIPPINES* 10-15 (Harcourt, Brace & Co. 1925).

<sup>82</sup> See Dean C. Worcester, *THE PHILIPPINES PAST AND PRESENT* 660-661 (Macmillan 1914).

connection to Aguinaldo, and requiring yet another dispatch of military forces.<sup>83</sup>

When Woodrow Wilson, was elected to the presidency in 1912, many Filipinos expected a transfer of sovereignty to themselves, for many Democratic legislators had professed to favor such a transfer. And some may even have read the book of Professor Wilson in which he had cautioned against the imperial-missionary impulse. Moreover, Wilson had named William Jennings Bryan as his Secretary of State, and Bryan had campaigned against imperialism as a presidential candidate in 1896, 1900 and 1908, and had in 1898 vigorously opposed the retention of the Philippines.<sup>84</sup>

As President, Wilson studied the issue of Philippine sovereignty and then accepted the advice of the Bureau of Insular Affairs in the War Department. That advice was formulated by a knowledgeable military general and his aide, Felix Frankfurter, then a recent graduate of the Harvard Law School. Frankfurter rightly perceived that the Filipino elite had "little community of interest and little sympathy"<sup>85</sup> with the people, and that it would be necessary to broaden the political base before sovereignty could be relinquished to a government in democratic form. Wilson had himself expressed a like view as early as 1902. He was critical of Aguinaldo's American supporters and proclaimed that the Filipinos "are children and we are men in these deep matters of government and justice."<sup>86</sup> Wilson appointed Francis Burton Harrison, a Congressman from New York, as Governor General of the Philippines. Harrison had been a student of Wilson's at the New York Law School and had for a time taught in that institution. He had also served with Roosevelt in Cuba as a member of the New Yorkers' Rough Rider Regiment.

Arriving in Manila in 1913, Harrison was soon genuinely enamored of Filipinos.<sup>87</sup> He brought word that America would surrender sovereignty and that "[e]very step we take will be taken

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<sup>83</sup> *Id.* 457-458.

<sup>84</sup> *Id.* at 339-384.

<sup>85</sup> Karnow, *supra* note 79, at 243.

<sup>86</sup> *Id.*

<sup>87</sup> Anne Cipriano Venzon, *Francis Burton Harrison*, 10 *AMERICAN NATIONAL BIOGRAPHY* 208 (John A. Garraty & Mark C. Carnes eds., 1999).



with a view to the ultimate independence of the islands.”<sup>88</sup> He promptly began to replace American administrators appointed by Taft with Filipinos; the number of Americans in the government diminished from three thousand to six hundred.<sup>89</sup> Indeed, he proceeded at a pace somewhat frightening to those who shared the concern expressed by Frankfurter or who feared the aggressiveness of the Empire of Japan. Even Manuel Quezon, the leader of the nationalists expressed concern about the loss of the American administrators and their replacement by self-seeking natives whose notions of public service were based on their observations of the conduct of the corrupt Spanish viceroys.<sup>90</sup> Congress nevertheless ratified President Wilson’s promise of future independence in 1916. Years later, Harrison would return to advise the Filipino government, be named the first honorary citizen of the Republic of the Philippines, and be buried in Manila.

Bryan was succeeded as Secretary of State in 1915 by Robert Lansing, who had been previously involved in East Asian matters. Lansing proposed the transfer of the Philippines to Japan, partly as a means of calming the Japanese appetite for expansion on the continent of Asia, and partly because he regarded continuing American involvement in the Philippines as a signal of imperial ambitions evoking mistrust on the part of other nations, especially Japan, a nation he regarded as a much more attractive market for American goods than the Philippines.<sup>91</sup> He also regarded the democratization of Philippine society improbable at best. It is possible that such a transfer might have been made in September 1917 when Lansing engaged in extensive negotiations with the Japanese, but in light of the collapse of Russia and entry of both Japan and the United States into the European war, the proposal was not made.

A later Governor General of the Philippines, appointed in 1922 by President Coolidge, was Henry Stimson. Stimson had been a junior partner in the New York law firm of Elihu Root, a military officer in Cuba with Roosevelt, and a Secretary of War to

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<sup>88</sup> Karnow, *supra* note 79, at 245.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Burton F Beers, VAIN ENDEAVOR: ROBERT LANSING’S ATTEMPTS TO END THE AMERICAN-JAPANESE RIVALRY 109 (1962).

President Taft, again a military officer in France, and a troubleshooter for the Coolidge Administration. He brought great prestige to the office and was, like Taft and Harrison, well received by Filipinos. While Governor General, he won favor by addressing Filipinos as his "fellow countrymen," entertaining the local elite in the Malacañon Palace, and addressing Manuel Quezon, their leader, in precisely the same tones as "if [he] had been an American sitting at his council table as the senior member of his official family."<sup>92</sup> But, like his fellow Republican Taft, Stimson disfavored early independence, arguing instead for a dominion status for the islands, an idea that found favor neither in the Philippines nor in the United States.<sup>93</sup>

From the beginning, the Americans present in the Philippines, like those who first appeared in Hawai'i, were keenly interested in education. Their objectives in establishing public education in the Islands mirrored those of Horace Mann and other early advocates of public education in America: they believed that literacy and a measure of sophistication was a prerequisite to democratic citizenship. Quite reasonably, they perceived that educated Filipinos would be more likely to find their own way to democratic traditions. Taft explained this shared view:

I am aware that our plans for education have been the subject of considerable criticism by men whose experience in Eastern countries entitles their view to great weight, on the ground that by giving education to the people we unfit them for agricultural and other manual pursuits and inspire them with a desire to succeed only as clerks and professional men. That the result of higher education upon a people unfitted by training and moral stamina to use it to good purpose may be productive of evil need not here be denied or discussed. That superficial education frequently produces discontent and brings about social disturbances may also be conceded. The condition, however, which is most productive of social disturbances is the existence of a vast mass of ignorant people easily and blindly led by the comparatively few of their superficially educated countrymen

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<sup>92</sup> Manuel Luis Quezon, *THE GOOD FIGHT* 146-47 (1946).

<sup>93</sup> Stimson's position in independence is examined in GODFREY HODGSON, *THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON 1866-1950* 122-141 (1990); his experience in the islands is recorded in HENRY L. STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 128-152 (1948).

into insurrection and lawless violence without any definite knowledge or certainty as to the beneficial results therefrom. The theory upon which we justify, even on political grounds, the spread of education is that the more the mass of ignorant persons is reduced in number by diffusing among them common school education, the less likely are they to be led away by degenerate political fakirs...<sup>94</sup>

Thousands of American schoolteachers spent their careers in the Philippines. Necessarily, this effort had the secondary consequence of disseminating the English language throughout the archipelago.

In 1910, an American-style law school was established at the University of the Philippines. The founding dean was George Malcolm, a then recent graduate of the University of Michigan Law School and former Clerk to the Supreme Court of Michigan. Malcolm served the school for seven years before moving on to the Supreme Court of the Philippines, where he remained for eighteen years.<sup>95</sup> Other law schools followed, and Malcolm's University of the Philippines College of Law was admitted to membership in the Association of American Law Schools so that its faculty could be socialized to American law professors' presumably correct sense of their roles. Also among the American law teachers to serve in the Philippine government was Eugene Gilmore from the University of Wisconsin.<sup>96</sup> Gilmore was a native Nebraskan who had studied law at Harvard and then moved on to an academic career. He spent a semester at the University of the Philippines in 1917. He was well-liked among the Filipino students and was "successful in upgrading the curriculum and reorganizing the law library."<sup>97</sup> His semester there led in 1922 to his appointment by President Harding as Vice-Governor General. In that position, he also served as Secretary of the Department of Public Instruction, thereby overseeing education, public health and

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<sup>94</sup> John Bancroft Devins, AN OBSERVER IN THE PHILIPPINES 204-205 (1905).

<sup>95</sup> Malcolm recorded his experience as an educator in *Changes in the College of Law*, 4 PHILIPPINE L. J. 13, 13-15 (1914); *Farewell Address of George A. Malcolm on Retiring as Dean of the College of Law, University of the Philippines*, 4 PHILIPPINE L. J. 5 (1914).

<sup>96</sup> Gilmore's career is recounted in Paul D. Carrington & Erika King, *Law and The Wisconsin Idea*, 47 J. LEG. ED. 297, 318 (1997).

<sup>97</sup> *Id.* at 336.

sanitation, and quarantines. Under Gilmore's direction, "the public school system of the Philippines was greatly expanded (both in geographical reach and enrollment figures) and the public health system much improved."<sup>98</sup> He served also as overseer of private schools and Chairman of the Board of Regents of the University of the Philippines. And, fittingly for a Wisconsin Progressive, he introduced Filipinos to "The Wisconsin Idea" that a public university could and should be an instrument for progressive social reform, serving to keep the people and the legislature well informed of the need for changes in law or policy.<sup>99</sup>

Other American lawyers, like Malcolm, served in the Filipino judiciary. During its early decades, a majority of its members were Americans. Among the initial Justices of the Supreme Court of the Philippines were Charles Willard, who had been a federal district judge in Minnesota; James Smith, formerly a San Francisco lawyer; Joseph Cooper, a member of the Texas Bar; and Fletcher Ladd, a recent graduate of the Harvard Law School. The American members served to introduce the Filipinos to the Anglo-American doctrine of precedent and to the principle of judicial review of legislation. Published opinions of the highest court became customary, and judge-made law in the American tradition was superimposed on the Roman system brought to the Philippines by the Spanish. Also, much of the text of the Constitution of the United States bearing on individual rights was perpetuated in the Philippine Constitution.<sup>100</sup>

These missionaries generally underestimated the difficulty of their mission. Their optimism regarding the political, cultural, and religious perceptions overlooked the acute mistrust resulting from divisions of ethnicity and class that pervaded the island populations. Tribal loyalties constituted as great an impediment to self-government among Filipinos as they had among the native population on the continent of North America. Conceivably, it was worse because it was reinforced by the topography of an

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> For a description of the court and the constitution *see* Joseph Ralston Hayden, *THE PHILIPPINES: A STUDY IN NATIONAL DEVELOPMENT* 49-50, 823 (1942) (containing the language of the Philippine bill of rights and describing its development).

archipelago, and by the policy of divisiveness pursued for three centuries by Spanish viceroys. The mutual trust on which stable institutions of self-government depend (as Professor Woodrow Wilson had himself emphasized) was absent among Filipinos and could not be provided externally, at least not without a much larger investment than the United States was willing or able to make.

Also overlooked by the optimists was the authoritarian aspect of religion as practiced in the Philippines, whether Catholic or Muslim. That characteristic reflected cultural traits of domination still common throughout Asia that seem to be associated with the cultivation of rice as the staple food, an activity calling for a high degree of social and political organization.<sup>101</sup> This hierarchical stratification was subsequently incorporated into the Filipinos constitution in 1935: they created a very powerful executive empowered to suspend its provisions. Manuel Quezon, the first President of the Commonwealth, could say at his inauguration: "The good of the state, not the good of the individual, must prevail."<sup>102</sup> Those peasants enabled to read these words would have recognized them as a threat to the interests of the disenfranchised, as indeed they proved to be.

Finally, the step that most needed to be taken if the Philippines were to become a stable democracy was not taken. That step was land reform.<sup>103</sup> This would have required a demotion of the status and power of the *caciques* and a denigration of their property rights. At least in the decades in which the United States exercised colonial power, this was not done. Still, at the end in 1946, there were millions of feudal peasants.<sup>104</sup> The importance of land reform was not overlooked, and a brief effort in that direction was made.<sup>105</sup> It was, however, politically impossible in part because the American regime in the islands depended on the support of the *caciques*, and in part because such a relocation of

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<sup>101</sup> See Fernand Braudel, *THE STRUCTURES OF EVERYDAY LIFE: THE LIMITS OF THE POSSIBLE* (Siân Reynolds trans., New York 1981).

<sup>102</sup> Karnow, *supra* note 79, at 255.

<sup>103</sup> Tony Smith, *AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* 52-53 (1994).

<sup>104</sup> See *id.* at 53-59.

<sup>105</sup> *Id.* at 55-57.

economic power was anathema to many Americans sharing the class-centered thinking of Gouverneur Morris. On that account, when the United States relinquished power, there was an active Communist movement among the peasants on Mindanao that had been raging there since 1930.<sup>106</sup>

Thus, in the Philippines, American-style democracy proved to be merely a fig leaf for the control of a hegemonic elite. Its secondary result was the oppressive rule of Ferdinand Marcos established in the 1960s and enduring for two decades. American political evangelism effected social change that was at best skin deep. American imperialism of the traditional European sort involving colonies was soon spent, but the American firms making markets in the Philippines were well served because Filipino *caciques* (like Hawaiian *ali'i*) quickly learned to buy and use American goods. In the second half of the century, Filipinos strived on their own to establish stable democratic law with America as a frequent model, but whether at the century's end closer to the goal of the evangelists is uncertain. It remains still a deeply divided society. There was a moment of irony in 2003 when the President of the United States cited the Philippines as a model for what America can do for Iraq<sup>107</sup> and, presumably, other nations lucky enough to be subjected to American rule for forty years.

### *E. Siam*

Quite different but notable efforts were made by American lawyers to advise the King of Siam on international law and on the development of legal institutions. From 1902 to 1949, the King retained the services of an American advisor. The considerations leading to that choice were that the British and French Empires had the kingdom hemmed in with competing claims to territory, while the Dutch, German and Japanese Empires were obviously ambitious to acquire new provinces.<sup>108</sup> King Chulalongkorn, who

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<sup>106</sup> It is apparently still raging. See *Reds Seize, Free Dozens of Hostages in Mindanao*, Manila Standard Today, August 24, 2006, available at [http://www.manilastandardtoday.com/?page=news04\\_aug24\\_2006](http://www.manilastandardtoday.com/?page=news04_aug24_2006).

<sup>107</sup> DAVID E. SANGER, *Bush Cites Philippines as Model in Rebuilding Iraq*, N. Y. TIMES, October 19, 2003, at 1, 20.

<sup>108</sup> On the situation in 1902, see JOHN G. D. CAMPBELL, *SIAM IN THE TWENTIETH CENTURY: BEING THE EXPERIENCES AND IMPRESSIONS OF A BRITISH OFFICIAL* (London

ruled for forty-two years, concluded that the domestic talents available to him for the conduct of foreign relations were not adequate to the enormous challenge. He therefore sought the advice of foreigners whom he hoped he could trust.<sup>109</sup>

The first person retained by King Chulalongkorn to fill his needs was a Belgian. The Belgian was found by the Siamese to be tactless and "overly legalistic." A decision was then made in 1902 to seek an American to advise the King. Admiral Dewey's triumph at Manila and the presence of anti-imperial sentiments in the United States made it the place to look for less threatening help.

The new position was first offered to John Bassett Moore a professor of law at Columbia, but he declined. Edward Henry Strobel, a Harvard law professor, was then hired. He was a native of South Carolina who had studied law at Harvard, practiced in New York for four years, and performed diplomatic service in the United States Department of State in Spain, Ecuador, and Chile before his appointment at Harvard in 1898. He was recommended to the Siamese by Harvard President Charles Eliot, who admired Strobel's "social address." It was also pertinent that he was fluent in five languages.<sup>110</sup> He was joined in Bangkok in 1904 by Jens Westengard, a junior colleague on the Harvard faculty.<sup>111</sup>

Strobel's primary responsibility as General Advisor was to conduct the foreign relations of the kingdom. Winning the confidence of the King and other Siamese leaders, he managed to settle the various problems with France, and had made good progress in resolving problems with Britain when he died in 1908. He also succeeded in securing royal promulgation of domestic legislation governing corporate organization, harbor regulation, and secret societies.

Strobel was succeeded by Jens Westengard, who remained in Siam until 1915. Westengard was a native of Chicago who had

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1902).

<sup>109</sup> KENNETH T. YOUNG, *The Special Role of American Advisors in Thailand 1902-1949*, 14 ASIA 1, (1969).

<sup>110</sup> A short biography of Strobel is provided THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 263-265 (1918).

<sup>111</sup> See ROBERT L. RAYMOND, JENS IVERSON WESTENGARD: A TRIBUTE 5 (Privately Printed 1919).

sold real estate for several years before attending law school. As a student, he made so favorable an impression on the law faculty that he was elevated to assistant professor immediately on graduation.<sup>112</sup> He and his young wife had invited the older bachelor, Strobel, to live with them, thus cementing the connection between the two men.

Westengard was, if possible, even more successful than Strobel in winning the confidence of the Siamese. As he explained his position to President Eliot, he had no power or authority except such as he might gain by being persuasive with respect to a particular matter.<sup>113</sup> He was elevated to the office of General Advisor in 1909. He completed the negotiations with Britain and managed to persuade the European governments to withdraw their consular courts, thus subjecting their nationals to the jurisdiction of Siamese courts. To assist in making the Siamese judiciary credible, he took a position on the highest court of Siam, sitting only on those cases of greatest concern to foreign powers. In 1911, he was also appointed to represent Siam as a judge available to the international tribunal sitting at The Hague. It does not appear that he ever sat on a case in that forum, but he retained the position even after he left Siam.

Westengard was also instrumental in the construction of a railroad from Bangkok to Singapore, and was at times preoccupied with the status of Chinese immigrants. The key to his success was his tact and modesty. He wisely observed that

It is the highest good I have done here if I never know whether my remarks had anything to do with accomplishing the desired result. ... The best things I have done are not known, sometimes not even to myself, and I can do most good by retiring as far as possible from the appearance of driving the machine.<sup>114</sup>

Like Wigmore in Japan, Westengard treated the local culture with respect. He did not advocate a constitutional scheme of the American sort. It was not his place to do so. He and Strobel were, however, instrumental in repairing the dyke that prevented Siam from being overrun by imperialists. The British in particular

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<sup>112</sup> *Id.* at 4.

<sup>113</sup> Westengard to Charles Eliot, April 9, 1912, in Box 2-4, Westengard Papers, Harvard Law Library (examined by author).

<sup>114</sup> Young, *supra* note 109, at 31.



resented the role of the Americans and remained a continuing threat to Siamese sovereignty.

Westengard returned to Harvard in 1915 as the Bemis Professor of International Law, but died in the influenza epidemic of 1918. He was succeeded in Bangkok by a series of American advisors, none of whom acquired his stature in Siam. Two of these, Eldon James and Francis Sayre, were also members of the Harvard Law faculty. In 1932, the first Thai constitution was ratified. It marked the end of the absolute monarchy. The first draft of the constitution was prepared in 1926 by Sayre in conformity with the king's directions, and introduced the nation to the techniques of representative government.<sup>115</sup> It would be replaced several times before the end of the century, but served as the base for the stabilizing reign of King Bhumibol, a reign that commenced in 1946 and continues at the present time.<sup>116</sup>

#### *F. Japan*

Americans would return to the challenge of writing other peoples' constitutions in 1945. The stated purpose of the requirement of unconditional surrender imposed on Germany and Japan was to assure an opportunity to punish war criminals, but it also facilitated programs of reconstruction not unlike those imposed on the former Confederate states in 1865. Thus, the Potsdam Declaration of July 1945 proclaimed on behalf of the triumphant Allies:

We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.<sup>117</sup>

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<sup>115</sup> KOBKUA SUWANNATHAT-PIAN, *KINGS, COUNTRY AND CONSTITUTIONS: THAILAND'S POLITICAL DEVELOPMENT 1932-2000* 86 (2003).

<sup>116</sup> *See id.* at 45.

<sup>117</sup> Potsdam Declaration §10. For an account of the conference producing the Declaration, *see* HERBERT FEIS, *BETWEEN WAR AND PEACE: THE POTSDAM CONFERENCE* (1960).

Thus, Japan would be required explicitly to embrace the Declaration of Independence.

President Truman was a rookie President who had not as Vice President even been informed of the atom bomb project. His new Secretary of State was James Byrnes, an orphan, who had limited formal education and had trained as a lawyer in an office in South Carolina. He had practiced law in that state before his elevation to the United States Senate.<sup>118</sup> In 1945, he was familiar with neither Germany nor Japan, but he was the main player at the Potsdam Conference at the conclusion of the war in Europe, and was perhaps the person most responsible for the decision to use the atomic bomb.<sup>119</sup>

On matters pertaining to the occupation of the two former enemy nations, Byrnes was advised by Henry Stimson and John McCloy, the veteran leaders of the War Department. He was persuaded by them, with particular regard to Japan that

The spiritual disarmament of a people is a much more difficult task than their physical disarmament. To instill the democratic concept of the individual in the Japanese requires a major social revolution. It can be accomplished only if we can make certain that a whole new generation of Japanese is educated in accordance with this democratic ideal.<sup>120</sup>

This statement, like Jefferson's Declaration conflated democracy with individualism. It was not imaginable to him, or to many other Americans, that the Japanese or German people might prefer to live in a society in which individualism is strictly constrained to conform behavior to community expectations. But he clearly perceived that the result sought by those seeking to spread the American word would have to be an accomplishment of the Japanese people. How "we can make certain" that they would achieve it is a question he never tried to answer.

These leaders thus saw the unconditional surrenders as invitations to assist, but only to assist, in "re-engineering" the

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<sup>118</sup> For his biography *see generally* DAVID ROBERTSON, *SLY AND ABLE: A POLITICAL BIOGRAPHY OF JAMES F. BYRNES* (1994).

<sup>119</sup> Reflections on his role are in JAMES F. BYRNES AND THE ORIGINS OF THE COLD WAR 49-57 (Kendrick A. Clements ed., 1982).

<sup>120</sup> JAMES F. BYRNES, *SPEAKING FRANKLY* 225 (1947).

societies that were seen to be hostile to America and its notions.<sup>121</sup> The occupation governments they created had at least six important advantages over previous efforts employed by the United States to democratize former Spanish colonies. First, both Germany and Japan were devastated physically and morally. Second, both peoples expected brutal treatment from occupation forces and were attracted to any signs of common humanity and respect. Third, both were highly literate societies. Fourth, both had experience with parliamentary democracy. Fifth, both had had constitutions, even if they had little experience with judicial enforcement of those instruments. Sixth, neither was in 1945 afflicted with a ruling class set in its ways and resistant to change; for their ruling classes were reduced to poverty and impotence. Ruling classes would in time revive and to some extent restore themselves, for example, the ruling class in the Confederate States had revived, but meanwhile the threat of the Soviet Union not only heightened the incentive of the United States to make potential allies of its former enemies, but elevated the receptivity of many Germans and Japanese to affiliation with the United States. For all these reasons, the two nations were willing and able to reconstruct themselves in ways congenial to the United States.

Edwin Reischauer offered a generous assessment of the occupation of Japan:

Never before had one advanced nation attempted to reform the supposed faults of another advanced nation from within. And never did the military occupation of one world power by another prove so satisfactory to the victor and so tolerable to the vanquished.<sup>122</sup>

No doubt this assessment overlooks small blunders and abuses of power that were inadequately restrained.<sup>123</sup> But those have over the ensuing half-century also been largely overlooked by the people of Japan and their leadership.

There was a measure of irony in the fact that so authoritarian a

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<sup>121</sup> DALE M. HELLEGERS, *WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 3 (2001).

<sup>122</sup> EDWIN O. REISCHAUER, *JAPAN: THE STORY OF A NATION* 221 (3d ed., New York 1981).

<sup>123</sup> For a less generous assessment see JOHN D. MONTGOMERY, *FORCED TO BE FREE: THE ARTIFICIAL REVOLUTION IN JAPAN AND GERMANY* 5-6, 14-15, 191-199 (1957).

person as General Douglas MacArthur should be the leader of the effort to democratize Japan.<sup>124</sup> It was his original vision that what was needed was to convert the Japanese to Christianity. To that end, he imported to Japan millions of Bibles.<sup>125</sup> What became of them, no one seems to know.

Perhaps the most important accomplishment of MacArthur's command was the re-writing of the Japanese constitution. As Stimson had early observed to his colleagues, Japan from 1932 to 1945 had reverted to authoritarian and militaristic ways familiar to the Japanese from the times preceding the Meiji Restoration. As a consequence of that Restoration, "[t]he mechanics of democracy" had by the early 20<sup>th</sup> century "become familiar, but the philosophy of democracy had not taken hold" sufficiently to withstand the imperial ambitions of the military.<sup>126</sup> The Meiji constitution of 1891 contained a bill of rights, but exempted the Emperor from its constraints, and the military had always asserted that it was acting on behalf of the Emperor. Nevertheless, even in the late 1930s, the Supreme Court had on occasion enforced the constitution against the military.<sup>127</sup>

A non-governmental group of Japanese scholars and politicians had at the time of the surrender proposed radical constitutional changes including abolition of the peerage, a bar to discrimination by birth, status, sex, race, and nationality and a guarantee of free hospitalization and old age benefits.<sup>128</sup> A communication from Washington added to this list a proposal to empower elected local officials, and General MacArthur, the Supreme Commander, perhaps at the suggestion of a Japanese advisor, urged a permanent national commitment to pacifism.

A provisional Japanese government created by the occupying American army was invited to do the job of re-writing the Meiji

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*See generally* WILLIAM RAYMOND MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964* (1978) (describing the governing style of MacArthur as somewhat authoritarian).

<sup>125</sup> DOUGLAS MACARTHUR, *REMINISCENCES* 276, 310 (1964).

<sup>126</sup> JOSHUA MURAVCHIK, *EXPORTING DEMOCRACY: FULFILLING AMERICA'S DESTINY* 94 (1991).

<sup>127</sup> *See* BEER & MAKI, *supra* note 27. On postwar constitutionalism in Japan, *see generally* Upham, *supra* note 25.

<sup>128</sup> JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 355-360 (1999).

constitution of 1891 with these suggestions in mind.<sup>129</sup> The committee appointed by the provisional government produced a draft rejecting all of these suggestions. On the advice of General Courtney Whitney, MacArthur in turn rejected the committee's draft.<sup>130</sup> Whitney had been MacArthur's personal attorney in pre-war years and was the direct overseer of the reorganization of the Japanese government. The decision to reject their draft was made on February 3, 1946. The next day, Whitney convened a drafting committee in the ballroom on the sixth floor of the Dai Ichi Building and gave them eight days to produce a suitable draft.<sup>131</sup>

The person designated to command the re-writing was Colonel Charles Kades. Kades was another Wall Street lawyer, and Harvard Law graduate. He was assisted by Milo Roswell, a Stanford Law graduate, who had practiced law in Fresno and participated in Republican politics in California, and by Alfred Hussey, a graduate of the University of Virginia Law School described as a "Massachusetts lawyer with a small practice, who wore his idealism openly."<sup>132</sup> None of the three was well informed about Japanese history and culture. They were assisted by others who were somewhat better informed. The most important of these was Beate Sirota, a Jewish woman born in Vienna and raised in Tokyo, who was a 1945 graduate of Mills College in California.<sup>133</sup>

The Kades team was careful to adhere as closely as possible to the Meiji Constitution, which had been given to the Japanese people in 1891 as a gift from the Emperor. Adopting the vision of monarchy embraced by England in the Glorious Revolution of 1688, they undertook to prescribe the Emperor's powers narrowly and to enlarge the power of the elected Diet to resemble the British Parliament.<sup>134</sup> Local governments were created and empowered. A Supreme Court was commissioned to enforce the constitutional

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<sup>129</sup> RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR, 50-78 (2002).

<sup>130</sup> *Id.* at 119.

<sup>131</sup> See THEODORE MCNELLY, THE ORIGINS OF THE JAPAN'S DEMOCRATIC CONSTITUTION 5 (2000); DOWER, *supra* note 128, at 364-373.

<sup>132</sup> Hellegers, *supra* note 121, at 522.

<sup>133</sup> Her autobiography is BEATE GORDON, THE ONLY WOMAN IN THE ROOM: A MEMOIR (1997).

<sup>134</sup> MOORE & ROBINSON, *supra* note 129, at 290.

divisions of power. Its judges were also made accountable to the electorate; they would be required to stand for popular confirmation at the first general election after taking their seats, and again ten years later. This was a variation on the "Missouri Plan" fashioned for use in American state courts by the American Judicature Society.<sup>135</sup>

A bill of rights was added. At the behest of Sirota, a provision guaranteeing gender equity was inserted. They also included a provision prohibiting aggressive war. It was contended that these new provisions should be unamendable to prevent future fascists from "abrogate[ing] "rights now accepted as inherent in the state of man."<sup>136</sup> Kades successfully resisted that contention, observing that such an expression of mistrust would make change possible only by revolution. Hussey wrote a preamble to the Japanese constitution sounding very much like the preamble to the Constitution of the United States or the Gettysburg Address. Kades deleted from Hussey's draft language proclaiming that the "laws of political morality are universal" and "obedience to such laws is incumbent upon all nations who would sustain their own sovereignty" on the ground that because it did not reflect reality, its inclusion would weaken the instrument.<sup>137</sup>

General Whitney then presented the Kades-Hussey-Roswell draft to the committee appointed by the Japanese government.<sup>138</sup> He advised them that MacArthur regarded the draft the Japanese had prepared as wholly unacceptable, that the Americans' draft embodied principles MacArthur believed to be demanded by the Japanese situation, that if they disagreed, it would be impossible to protect the person of the Emperor, and that MacArthur himself would take the matter before the Japanese people.<sup>139</sup> The Japanese draftsmen were reduced to tears,<sup>140</sup> but, after some haggling, acceded, and the Americans' draft with minor revisions was

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<sup>135</sup> The model is described in SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 11-13 (1980).

<sup>136</sup> MOORE & ROBINSON, *supra* note 129, at 106.

<sup>137</sup> HELLEGERS, *supra* note 121, at 554-56.

<sup>138</sup> See MOORE & ROBINSON, *supra* note 129, at 111-123; DOWER, *supra* note 128, at 374-404.

<sup>139</sup> Hellegers, *supra* note 121, at 527-28.

<sup>140</sup> Dower, *supra* note 128, at 383.

published. It was a gift of the United States in precisely the sense that the former constitution had been a gift from the Emperor's grandfather. The cabinet wanted to delete Hussey's preamble but was not permitted to do so. As published, it was publicly supported by a Prime Minister who privately reviled it, and by the Emperor.

The Kades draft was, however, "welcomed and embraced" by the Japanese people if not by their political leadership.<sup>141</sup> The people were not sorry to observe the demise of the militarists who had led them to disaster and were generally eager to embrace pacifism. Among the Japanese who influenced the popular acceptance of democratic reform were Nanbara Shigeru, the Christian president of the University of Tokyo, and Tanabe Hajime, a professor of philosophy at the University of Kyoto who advocated Buddhist repentance for the nation. The parliamentary Diet in due course approved the American draft with minor changes.<sup>142</sup> The House of Peers approved its own dissolution.<sup>143</sup> The Emperor promulgated it in 1946.<sup>144</sup> As of this writing, it has not been amended.

The Supreme Court of Japan was soon housed in a structure that was, if possible, even more grand than that of the Supreme Court of the United States.<sup>145</sup> However, it seems that the court was not to play nearly so grand a role in the national government. Reflecting the narrow popular base of the legal profession in Japan, and its more technocratic tradition, the courts of Japan have a small political base and are mindful of the resulting constraints. Also, because Japan is not a federation, and has a stable popular Diet with almost complete legislative responsibility, and is afflicted with fewer divisions of class or ethnicity, there have been fewer political demands placed on its judiciary.<sup>146</sup>

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<sup>141</sup> McNelly, *supra* note 131, at 88.

<sup>142</sup> Dower, *supra* note 128, at 486-504.

<sup>143</sup> See Moore & Robinson, *supra* note 129, at 282-314 (describing the role of the House of Peers in the constitutional process).

<sup>144</sup> *Id.* at 282.

<sup>145</sup> See generally Upham, *supra* note 25 (discussing the facilities enjoyed by the Japanese judiciary).

<sup>146</sup> PERCY R. LUNEY, JR., *THE JUDICIARY: ITS ORGANIZATION AND STATUS IN THE PARLIAMENTARY SYSTEM, THE CONSTITUTION OF JAPAN- THE FIFTH DECADE: II GOVERNMENT PROCESSES AND THE SEPARATE OF POWERS*, 53 LAW & CONTEMP. PROBS. 135, 140-42

*G. Germany*

The writing of a new Basic Law in Germany proceeded quite differently and was at least equally successful. At Potsdam, as Stimson, McCloy and Byrnes had insisted, it was resolved by the Allied leaders meeting in the ashes of Nazi Germany, that they would not destroy or enslave the German people, but would allow for the "eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life"<sup>147</sup> While economic motives were present in the management of the second occupation of Germany in 1945-1949, they were distinctly secondary to political ones, especially so as the rivalry with the Soviet Union sharpened in 1946.<sup>148</sup>

While Germany was for a time divided into four zones of occupation, the American zone was almost instantly democratized with the holding of municipal elections.<sup>149</sup> Members were also soon selected for constitutional conventions for the regional *länder*. Hesse, Würtemberg-Baden, and Bavaria were functioning democratic governments in 1946.<sup>150</sup> In January 1948, at American initiative, the eleven German *länder* within the British, French, and American zones were invited to call a constitutional convention to draft an instrument to "protect the rights of the participating states, provide adequate central authority, and contain guarantees of individual rights and freedoms."<sup>151</sup> The stated hope was that the Germans would solve their own constitutional problems and that is largely what happened.<sup>152</sup>

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(1990).

<sup>147</sup> Potsdam Declaration Part 2(A)(3); *see generally* MICHAEL BESCHLOSS, *THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-45* (2002).

<sup>148</sup> *See* CAROLYN WOODS EISENBERG, *DRAWING THE LINE: THE AMERICAN DECISION TO DIVIDE GERMANY: 1944-1949* 459 (1996).

<sup>149</sup> *See* LUCIUS D. CLAY, *DECISION IN GERMANY* 11-19 (1950) (discussing the conditions of occupied Germany immediately after the war).

<sup>150</sup> EDMUND SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW* 81-112 (2001).

<sup>151</sup> DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 9 (1994).

<sup>152</sup> *See* CLAY, *supra* note 149, at 281-305 (discussing the Allied attempts to establish trust and foster democracy in occupied Germany).



A Parliamentary Council was created by the eleven *länder*. It produced a draft Basic Law. When the Allied High Command led by General Clay insisted that the first draft provided for too much centralization and inadequate deference to the role of the *länder*, modifications were made without staining the instrument with American authorship.<sup>153</sup> It took effect on May 23, 1949. The person who mediated between the draftsmen and General Clay was Carl Joachim Friedrich, a German emigrant who had settled in the political science department at Harvard.<sup>154</sup>

Reasonable minds have since differed on the degree of American influence on its text.<sup>155</sup> General Clay later admitted that he went beyond his directives from Washington in an effort to shape it. There is no doubt that most German citizens were between 1945 and 1949 involved in material questions and in their own survival, and were not generally attentive to abstract political issues of constitutional import.<sup>156</sup> It is not unlikely that Germans and Americans were each eager to allow the other to think of the text as theirs. While it seems unlikely that the German authors would have embraced the principles of federalism absent American influence, the resulting text was otherwise distinctively German. Many features of the American Constitution were considered and rejected. No American lawyer participated in the drafting.

The Basic Law features a Bill of Rights more extensive than any familiar to the American experience.<sup>157</sup> Human dignity was proclaimed as the first and most fundamental right.<sup>158</sup> It is enforced by a constitutional court with broader political responsibility than is conferred on American courts. That court's lack of timidity was demonstrated in 1975 when it held that the

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<sup>153</sup> See JEAN EDWARD SMITH, LUCIUS D. CLAY: AN AMERICAN LIFE 387-395 (1990).

<sup>154</sup> See *id.* at 231, 391.

<sup>155</sup> See Spevack, *supra* note 150, at 13-33; JOHN FORD GOLAY, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY 27-112 (1958); MICHAEL J. BAUM, *The Federal Republic of Germany* in POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 79-80 (Daniel P. Franklin & Michael J. Baun eds. 1995).

<sup>156</sup> See RICHARD L. MERRITT, DEMOCRACY IMPOSED: U. S. OCCUPATION POLICY AND THE GERMAN PUBLIC: 1945-1949 328-30 (1995).

<sup>157</sup> For a definitive work comparing the Bills of Rights, see generally CURRIE, *supra* note 151.

<sup>158</sup> *Id.* at 11.

duty of the state to protect human dignity required that it make abortion a crime.<sup>159</sup>

The Constitutional Court's judges are chosen half by the *Bundestag* whose members are directly elected by the people and half by the *Bundesrat* whose members are appointed by the legislatures of the *länder*.<sup>160</sup> By statute, the judges on the Constitutional Court serve twelve-year terms and are not eligible for reappointment, so there is no structural incentive to make popular decisions.<sup>161</sup> The court is divided into two panels expected to respect one another's decisions as precedents.<sup>162</sup> The Basic Law can be amended by supermajorities of the *Bundestag* and the *Bundesrat*.<sup>163</sup> It was amended thirty-five times in its first forty years.<sup>164</sup>

Whether the German Basic Law as enforced by the Constitutional Court is an advance over its American counterpart might be usefully debated. Certainly it is a creature of pre-existing German law and culture. David Currie has observed that the "basic principle of freewheeling judicial review [by the Constitutional Court] is reminiscent of that which gave us *Scott v. Sandford*, *Lochner v. New York*, and *Roe v. Wade*."<sup>165</sup> But, as he also observes, it may fit the political context. He concludes that:

Unlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms; they do seem to have spared their compatriots a flock of unjustified restrictions on liberty and property.<sup>166</sup>

And he concludes that the Basic Law must be regarded as "a resounding success."<sup>167</sup>

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<sup>159</sup> DONALD P. KOMMERS, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 BYU L. REV. 371, 372, 377-379 (1985); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 25-33 (1987).

<sup>160</sup> CURRIE, *supra* note 151, at 26-27.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 29-30.

<sup>163</sup> *Id.* at 375.

<sup>164</sup> *Id.* at 30.

<sup>165</sup> *Id.* at 337.

<sup>166</sup> *Id.* at 338.

<sup>167</sup> *Id.* at 339.

The military occupation of Germany ought be assessed at least in part on the value of that resounding success. The occupation government has been subjected to sometimes searing criticism by scholars. Perhaps most trenchant was George Kennan's protest against Americans living (as Americans are prone to do when the opportunity is presented) in ostentatious luxury, even amid the ruins and horrors of war.<sup>168</sup> No doubt there were many, many acts, official as well as unofficial, that were mean or stupid. One can neither prove nor disprove the hypothesis that a different approach to Germany could have prevented the Cold War. Nor can one deny that American motives to favor German initiative were associated with the selfish motive of impeding Soviet efforts to incorporate all of Germany into its network. But the occupation of Germany was, at the end of the day, a success in the only way that it could have succeeded, by enabling Germans to make the best democratic government they as Germans were then capable of making.

#### *H. Israel*

The Zionist Movement aiming to establish a Jewish homeland in Palestine first became a significant political force in the early years of the 20<sup>th</sup> century. In part, it was a response to the rise of nationalism in Europe. But it had roots in Biblical texts promising that the Son of God would return if the Jews did.<sup>169</sup> More than a few English Protestants had envisioned such a return and lent support to the Zionist idea.<sup>170</sup> And some American Protestants not only shared that vision, but had since the eighteenth century been sending religious missionaries to the Ottoman Empire in the hope of advancing the cause.<sup>171</sup> The Movement gained strength among European and American Jews in the 1880s when the Czar sponsored pogroms against his Jewish subjects.<sup>172</sup> A need

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<sup>168</sup> GEORGE F. KENNAN, MEMOIRS 1925-1950 428-29 (1967).

<sup>169</sup> See DAVID VITAL, THE ORGINS OF ZIONISM 3-20 (1975) (describing the positions and beliefs of Jews related to the restoration of the Jewish State).

<sup>170</sup> See BARBARA W. TUCHMAN, BIBLE AND SWORD: ENGLAND AND PALESTINE FROM THE BRONZE AGE TO BALFOUR 121-146 (Alvin Redman 1956).

<sup>171</sup> See generally MICHAEL B. OREN, POWER, FAITH AND FANTASY: AMERICA IN THE MIDDLE EAST 1776 TO THE PRESENT (2007).

<sup>172</sup> DAVID VITAL, A PEOPLE APART: THE JEWS IN EUROPE 1789-1939 283-290 (1999) (describing the 1880 pogroms in Russia)

appeared for a Jewish homeland as a sanctuary for those unwelcome in Eastern Europe.<sup>173</sup> Zionism was, however, disapproved by many Jewish persons in Europe, America, and elsewhere, who favored greater assimilation into the societies in which they lived, and who feared that the creation of a homeland would magnify the mistrust of those who saw them as members of a great world-wide Jewish conspiracy and disloyal to the communities in which they resided.<sup>174</sup>

Among those favoring a return of eastern European Jews to Palestine was Louis Brandeis. Brandeis was Jewish but did not observe Judaism and was a Zionist only because he perceived the moral teachings of Jewish culture to be important and in need of preservation, and because he was concerned for victims of pogroms.<sup>175</sup> Brandeis saw the Jewish *kibbutzim*, communitarian farms, as institutions fostering those moral values that he most strongly approved and that he found as a subtext to Jefferson's Declaration of Independence. He hoped that a Jewish state might "teach other nations how to live."<sup>176</sup> On that account, he became in 1915 the leader of the Zionist Movement in the United States.<sup>177</sup> He dispatched his close friend and ally Felix Frankfurter to attend the Versailles Peace Conference to advocate the cause. In 1920, there was a falling out between these American Zionists and the international organization led by Chaim Weizman on the question of the status of the Palestinian population whom Weizman proposed to buy out and remove to make room for a state committed to the advancement of the Jewish faith.<sup>178</sup>

The British imperial government governed Palestine for the next quarter century without resolving the issue. Among the Jews immigrating to Palestine during that period were a handful of

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<sup>173</sup> BEN HALPERN & JEHUDA REINHARZ, *ZIONISM AND THE CREATION OF A NEW SOCIETY* 40-41 (1998).

<sup>174</sup> MELVIN I. UROFSKY, *AMERICAN ZIONISM FROM HERZL TO THE HOLOCAUST* (1975).

<sup>175</sup> See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 224-47 (1984) (describing Brandeis' identification with fellow Jews and association with the Zionist movement).

<sup>176</sup> On the politics of Brandeis, see *id.* at 237-47.

<sup>177</sup> Halpern & Reinharz, *supra* note 173, at 177.

<sup>178</sup> JEHUDA REINHARZ, *CHAIM WEIZMANN: THE MAKING OF A STATESMAN* 292-303 (1993).

Americans. Among them was Simon Agranat, a native of Louisville, the son of Russian immigrants, and a graduate of the University of Chicago Law School, who followed his parents when they moved to Haifa in 1930.<sup>179</sup> As a youth, he had been deeply troubled by a sense that American Jews were people without a country;<sup>180</sup> he greatly admired his fellow native of Louisville, Louis Brandeis, and was much troubled by the rupture between Brandeis and Weizmann. Before going, he consulted his luminous Jewish law professor, Ernst Freund, a close friend of Brandeis. Freund expressed the anti-Zionist sentiment shared by most American Jews in the 1920s.<sup>181</sup> He dismissed as foolish Agranat's idea of moving to Palestine.

Nevertheless, Agranat went. He took a clerkship with a lawyer in Jerusalem that would qualify him to practice law in the Mandate. As a lawyer, he often represented illegal Jewish immigrants seeking refuge from European anti-Semitism. While much troubled in doing so, in 1940 he pledged allegiance to the British Crown to become a citizen of Palestine, as he needed to do in order to become a judge.<sup>182</sup> Yet he remained an ardent fan of the Chicago Cubs baseball team, remained keenly interested in American Civil War history, and continued all his life to speak English with a marked Chicago accent.<sup>183</sup>

By 1946, with full disclosure of the extent of the Nazi holocaust, Jewish demands for a nation of their own had become militant. That summer, the Jewish group Irgun blew up the King David Hotel in Jerusalem, killing ninety-one people including numerous officers of the Mandatory Government.<sup>184</sup> The British government was not prepared either to resist or support the demand, and so it turned the mandatory responsibility over to the new United Nations in January 1947.<sup>185</sup> After studying the matter,

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<sup>179</sup> See PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 3-39 (1997).

<sup>180</sup> *Id.* at 210-213.

<sup>181</sup> *See id.* at 29-31.

<sup>182</sup> *Id.* at 63-64.

<sup>183</sup> *Id.* at xv-xvii.

<sup>184</sup> TOM SEGEV, ONE PALESTINE, COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE 476-478 (1999).

<sup>185</sup> *Id.* at 495.

the United Nations General Assembly voted, over the heated protest of all its Arab members, to partition Palestine and create separate states for Jews and Palestinians.<sup>186</sup>

The British left Palestine on May 13, 1948. War erupted in the streets. The next day, Israel issued a Declaration of Independence. This action was taken partly on the advice of a group of influential Americans that included Felix Frankfurter, by then himself a Supreme Court Justice, who had come around to support the idea of a Jewish state. After the Declaration was issued, the Truman Administration gave its putative government *de facto* recognition.<sup>187</sup> By 1947, most Americans had come to share that view. Among them for example, was Henry Morgenthau, Jr., a member of the cabinet and the son of the ambassador who had so sternly opposed Zionism in 1919.<sup>188</sup>

On the other hand, those responsible for thinking about international relations were universally opposed to active American support of a Zionist state.<sup>189</sup> The State Department led by General George Marshall was outspoken.<sup>190</sup> Indeed, the Secretary at one point advised the President that he would not vote for his re-election if he supported partition of Palestine and the creation of Israel.<sup>191</sup> His strong view was shared by the lawyers in the State Department including Dean Acheson and Robert Lovett, by George Kennan's departmental planning staff,<sup>192</sup> and by the new Central Intelligence Agency.<sup>193</sup> Their shared view was that Zionism in the form of a secular state was an affront to the rights of Palestinians to self-government, that it could not in the foreseeable future be sold to the peoples of any Arab state and would result in prolonged war in the region, that it would earn the

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<sup>186</sup> *Id.*

<sup>187</sup> PETER GROSE, *ISRAEL IN THE MIND OF AMERICA* 300 (1983).

<sup>188</sup> *See id.* at 81, 181, 196-97.

<sup>189</sup> *See* WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* 451-453 (1986) (discussing the recognition of Israel and noting that there was great opposition from a foreign policy front from Marshall, Lovett, Forrestal, Bohlen Keenan and Acheson).

<sup>190</sup> *See id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

enduring enmity to the United States of Muslim peoples from Morocco to Indonesia, that it would threaten the sources of oil needed to make a success of the Marshall Plan for the recovery of Europe, and that it risked placing the Arab states on the side of the Soviet Union in the unfolding Cold War, a contest that they foresaw as a hot war in the making. Secretary Marshall characterized the support of partition as "starting a fire with no means of putting it out."<sup>194</sup> He was insistent that neither domestic politics nor Deuteronomy should bear on the decision. Other means would need to be found to shelter the holocaust survivors. He was supported by James Forrestal, the Secretary of Defense, who was firm in the belief that non-existent American military resources would be needed to effect partition.<sup>195</sup>

The State and Defense Departments were opposed by the political advisors on the White House staff who were responsible for the re-election of the President.<sup>196</sup> On their advice, the President overruled the State and Defense Departments and the Central Intelligence Agency and recognized the secular state. Warren Austin, the Ambassador to the United Nations and formerly a Republican Senator from Vermont, a sometime village lawyer, did not resign, but he refused to express support for partition, leaving that task to his subordinates.<sup>197</sup>

The decision to support partition was probably inevitable. It was clear that Truman's Republican adversaries were committed to that program, and it seems reasonably certain that Truman's surprising victory in the election would not have occurred had the President followed the course laid out by the Department of State. While there was enormous political pressure brought to bear on both parties by Jewish Americans reacting to the holocaust, the cause was not one felt by Jews alone, but had very widespread support.

In the three years following the Israeli Declaration of Independence in 1948, almost 700,000 Jews migrated to Israel.

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<sup>194</sup> JAMES FORRESTAL, *THE FORRESTAL DIARIES* 373 (Walter Millis ed., 1951).

<sup>195</sup> *Id.* at 372-74.

<sup>196</sup> CLARK CLIFFORD, & RICHARD HOLBROOKE, *COUNSEL TO THE PRESIDENT: A MEMOIR* 3-6 (1991).

<sup>197</sup> See GEORGE T. MAZUZAN, *WARREN R. AUSTIN AT THE U.N. 1946-1953* at 111-115 (1977).

The flow would continue. A handful of these immigrants were Americans, and a very few were American lawyers. Meanwhile, in 1949, Simon Agranat was appointed to the Supreme Court of Israel.<sup>198</sup> In 1953, he wrote the opinion of the court justifying a decision to impose judicial review of legislation on the enactments of the Knesset, the Israeli parliament.<sup>199</sup> This decision was said to rest on John Marshall's opinion in *Marbury v. Madison*, but there was the difference that Israel had no written constitution. This remains so although a written constitution was favored by the United Nations partition decision of 1947 and was promised by the Israeli Declaration of Independence. In a 1953 opinion of the court by Justice Agranat, explicit reliance was placed in part on the wisdom of Zechariah Chafee's writings in the *Harvard Law Review*.<sup>200</sup> It was not coincidental that the court's library had recently received a complete set of the *Review* as a gift from a New York lawyer, a gift solicited by Agranat. Also cited in the opinion were Louis Brandeis, Learned Hand, Oliver Wendell Holmes, and Thomas Jefferson.<sup>201</sup>

In 1965, Agranat was elevated to Chief Justice and he served on the court until 1976. His influence on his court corresponded to the advice of Felix Frankfurter given to an Israeli Attorney General in the early years of the republic, that Israel did not need a written constitution, but did need an independent judiciary willing to enforce natural law.<sup>202</sup> Frankfurter's advice was contrary to that of the other eight Justices of the Supreme Court of the United States, all of whom counseled the need for a constitutional text, but his view prevailed. There are "basic laws" in Israel that have special status in that it is agreed that they will be modified only by a supermajority of the Knesset, but the Israeli constitution remained inorganic, a compound of these basic laws with judicial pronouncements and religious teachings. Yet references to

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<sup>198</sup> See Lahav, *supra* note 179, at 79-89.

<sup>199</sup> "Kol Ha'Am" Company Limited v. Minister of the Interior, 7 P.D. 871 (1953), reprinted in *SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL* 90 (1962).

<sup>200</sup> *Id.* at 104-14.

<sup>201</sup> *Id.* at 96-108.

<sup>202</sup> On Frankfurter's influence, see GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 95-100 (1993).



American decisions are common.<sup>203</sup> A successor of Agranat, Aharon Barak further expanded the role of the judiciary in the Israeli scheme of government; it was not a coincidence that he spent a month a year on vacation from his judicial duties in residence at American law schools.<sup>204</sup>

A close observer concluded that:

[T]he influence of the U. S. Constitution ... in Israel has been fairly subtle, confined largely, although not exclusively, to the realms of adjudication, and the legal academy. From these places American influence has radiated into the political arena; thus, for example, law professors, armed with American cases and jurisprudential theory, have played the catalytic role in mobilizing support for constitutional reform. . . [T]hey have not been wedded to the American constitutional approach, but they have borrowed extensively from it.<sup>205</sup>

Thus, to the extent that the ideas expressed in the American Declaration of Independence and Constitution have found their way into the government and law of Israel, it is because Israelis, Simon Agranat and Aharon Barak among them, willed it to be so.<sup>206</sup>

### III. Other More Recent Constitutions

Many other new nations emerged in the same period in which Israel emerged. The Japanese and Italian Empires were dismantled by the war, creating new nations in Asia and Africa. The British, French, Belgian, and Dutch Empires dissolved in the decade following the war, sometimes in response to uprisings, but often in the end voluntarily, reflecting the commitment made in the Atlantic Charter and the growing distaste of Europeans for the exercise of imperial might. The vestiges of the ancient empires of

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<sup>203</sup> See Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELEC. J. COMP. L. (2002) available at, <http://www.ejcl.org/61/art61-1.html>.

<sup>204</sup> On Barak's connection with American law schools, see Emily Bazelon, *Let There Be Law*, LEGAL AFFAIRS, May-June 2002, at 25-32, available at [http://www.legalaffairs.org/issues/May-June-2002/feature\\_bazelon\\_mayjun2002.msp](http://www.legalaffairs.org/issues/May-June-2002/feature_bazelon_mayjun2002.msp).

<sup>205</sup> JACOBSON, *supra* note 202, at 11.

<sup>206</sup> See generally Neta Ziv, *The Legal Profession: Looking Backward: Combining Professionalism, Nation-Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 FORDHAM L. REV. 1621 (2003) (examining the formation and development of the Israeli legal profession).

Portugal and Spain were also dissolved within another decade. Most of the new nations were deeply riven with cultural differences of race, religion, caste, tribe, language, and sexual mores making mutual trust between citizens unlikely. Such differences were almost certain to give rise to domestic conflict among groups having unequal prospects of survival in modern nations participating in international trade. The populations of many formerly colonial states did not soon form national identities imposing on their member-citizens mutual obligations of respect that might mitigate such entrenched rivalries as religious and ethnic differences.

Those new nations drafting new constitutions were seldom impressed by the example of American government. Most 20<sup>th</sup> century constitutions appear to have adopted a parliamentary system with a single dominant house choosing its own executive, although some created independent executives. Guarantees of individual civil liberties are not necessarily the norm. A few new nations, mostly those that had been parts of the British Empire, had legal professions that may have been somewhat better suited than others to the role envisioned and performed by the American legal profession in giving life to constitutional government as a means of providing a stable and democratic social and political order congenial to economic development. Elsewhere, nascent democracies under stress caused by ethnic mistrust often lacked a legal profession capable of providing the confidence in the integrity of legal institutions needed to mediate ethnic conflict.

One idea drawn from American experience and redolent of the American influence on the German and Japanese constitutions, gained currency in the United Nations and among numerous developing nations in the 1970s. It was the idea of transnational federation. It was hoped that small nations might gain stability and mutual strength through the process exemplified in Philadelphia in 1787. This idea seemed especially timely given that the former empires had served to connect many smaller colonies to other smaller colonies in ways that may have been constructive. Perhaps federations of former co-colonies might find the resources needed to establish social and political stability or a market economy. Thomas Franck served as consultant to several such projects.

Results were not generally encouraging. An East African

Federation of Kenya, Uganda, Tanganyika, and Zanzibar was momentarily formed, but soon fell apart. The same fate befell a Central African Federation of Northern and Southern Rhodesia and Nyasaland, states later known as Malawi, Zambia and Zimbabwe. A British West Indian Federation also quickly failed. Singapore was initially part of the Malaysian Federation, but was expelled. A Central American Federation was negotiated but never formed. Czechoslovakia and Yugoslavia disintegrated. Franck concluded that neither economic complementarity nor its opposite could sustain success; the essential ingredient was a moral "commitment to the political ideal of federation itself."

The trend to constitutional government would experience another surge in the 1970s. It would accelerate again with the birth of many new nations at the collapse of the Soviet Union and the end of the Cold War. In 2003, the European Union was at last at the task of devising a constitution for itself; an effort that seems for the moment to have failed.

#### **IV. Conclusion**

Many of the constitutions written in the late 20<sup>th</sup> century were drafted with the help of American consultants. Many of those constitutions contain ambitious guarantees of human rights. The caution has been expressed that "[a] constitution that purports to guarantee a decent society may, in the process, guarantee nothing at all." The extent to which many of these developments are merely cosmetic remains to be seen, and they are not, for that reason, the subject of this account. It would be unjustifiably pessimistic to suppose that they will be completely ineffective, at least where they take root in their respective cultures. But it is equally unjustifiably optimistic to suppose that any constitutional text can prevent groups from killing one another when they are strongly inclined to do so. The words of John Milton and of Professor Wilson should be kept very much in mind.